

# Exhibit H

**Privilege Log****Identification:****S. Augustine, CEO Augustine Temperature Management****B. Augustine, President, Augustine Temperature Management****R. Benham, General Counsel Augustine Temperature Management****D. Hodges, attorney****G. Assaad, attorney****J. Neuman, attorney****D. Grewe, executive employee of Augustine Temperature Management**

		Document Type	Date of Document	Author(s)	Recipient(s)	Persons Copied	Subject Matter	Category of Privilege
		Email series	2/1/13	S. Augustine, D. Hodges	D. Hodges, S. Augustine	R. Benham	Litigation: consulting relationship and potential product liability, unfair competition and/or other claims.	Attorney/Client: Benham/Augustine; Hodges/Benham-Augustine.  Work product: all attorneys.
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		Email series	6/6/13	R. Benham, D. Hodges	R. Benham, D. Hodges	G. Assaad, S. Augustine, B. Augustine	Litigation: sharing information regarding scheduling of communications and facts re potential product liability, unfair competition and/or other claims.	Attorney/Client: Benham/S. Augustine-B. Augustine; Hodges-Assaad/Benham-S. Augustine-B. Augustine  Work product: all attorneys
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		Email series	8/1/13	R. Benham, D. Hodges	R. Benham, D. Hodges	S. Augustine, D. Grewe, G. Assaad	Litigation: sharing information regarding potential product liability, unfair competition and/or other claims	Attorney/Client: Benham/S.Augustine-D. Grewe; Hodges-Assaad/Benham-S. Augustine-D. Grewe  Work product: all attorneys
		Email series	9/23/13	R. Benham, D. Hodges, G. Assaad	R. Benham, D. Hodges, G. Assaad	S. Augustine, B. Augustine	Litigation: sharing information regarding potential product liability, unfair competition and/or other claims	Attorney/Client: Benham/S.Augustine-B. Augustine; Hodges-Assaad/Benham-S. Augustine-B. Augustine  Work product: all attorneys
		Email series	11/20/13	R. Benham, D. Hodges	R. Benham, D. Hodges	G. Assaad, J. Neuman, S. Augustine	Litigation: sharing information regarding potential product liability, unfair competition and/or other claims	Attorney/Client: Benham/S.Augustine ; Hodges-Assaad-Neuman/Benham-S. Augustine  Work product: all attorneys
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							product liability, unfair competition and/or other claims	Neuman/Benham-S. Augustine  Work product: all attorneys
		Email series	2/6/14	R. Benham, D. Hodges, G. Assaad	R. Benham, D. Hodges, G. Assaad	S. Augustine	Litigation: sharing information regarding potential product liability, unfair competition and/or other claims	Attorney/Client: Benham/S.Augustine ; Hodges-Assaad-/Benham- S. Augustine  Work product: all attorneys
		Email series	5/14/14	R. Benham, D. Hodges, G. Assaad	R. Benham, D. Hodges, G. Assaad	S. Augustine	Litigation: sharing information regarding potential product liability, unfair competition and/or other claims	Attorney/Client: Benham/S.Augustine ; Hodges-Assaad-/Benham- S. Augustine  Work product: all attorneys
		Email series	1/26/15	G. Assaad, R. Benham, D. Hodges	G. Assaad, R. Benham, D. Hodges	S. Augustine	Litigation: sharing information regarding potential product liability, unfair competition and/or other claims	Attorney/Client: Benham/S.Augustine ; Hodges-Assaad-/Benham- S. Augustine  Work product: all attorneys
		Email series	2/9/15	G. Assaad, R. Benham	G. Assaad, R. Benham	D. Hodges, S. Augustine	Litigation: sharing information regarding scheduling of communications and facts re potential product liability, unfair competition and/or other claims.	Attorney/Client: Benham/S.Augustine ; Hodges-Assaad-/Benham- S. Augustine  Work product: all attorneys

# Exhibit I

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

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In Re:  
Bair Hugger Forced Air Warming  
Products Liability Litigation

This Document Relates To:

All Actions MDL No.  
15-2666 (JNE/FLM)  
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VIDEOTAPED DEPOSITION

OF

MARK ALBRECHT

VOLUME 1

Minneapolis, Minnesota

Friday, October 7th, 2016  
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Reported by:  
Amy L. Larson, RPR  
Job No. 112502



## 1 APPEARANCES:

2 ON BEHALF OF 3M:

3 COREY GORDON, ESQ.

PETER GOSS, ESQ.

4 BLACKWELL BURKE

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21  
22  
23 ALSO PRESENT: Kraig Hildahl, Videographer

ALBRECHT

Q. At the U of M?

A. Yes.

Q. So now you're a Gopher?

A. Yeah, well, it's hard to cheer for anything,  
but -- sports are...

Q. Okay. So you have a master's of statistics,  
a master's of business administration --

A. I do.

Q. -- and a BS in mechanical engineering?

A. Yup.

Q. Any other degrees --

A. Nope.

Q. -- that I missed? Okay.

Let's go back now and sort of  
summarize your work history.

A. Uh-huh.

Q. Did you work while you were in college?

A. Just internships. So I had a couple at  
Arizant Healthcare, which you guys own. Not  
you, but 3M.

Q. 3M wouldn't have owned it at the time, right?

A. No, no.

Q. Okay. And so we'll -- we'll get some details  
on that. But then anything else that you did

1 ALBRECHT

2 while you were in college?

3 A. That relates to this, I don't know. I ran  
4 sailboat races during the summers, it was a  
5 part-time job too on Lake Minnetonka, had a  
6 one year internship at Entegris, which used  
7 to be Fluoroware, so that's like a  
8 semi-conductor company, and that was it.

9 Q. Okay. And then after you graduated from the  
10 University of Wisconsin what was your first  
11 full-time job?

12 A. It was as a research and development engineer  
13 at Arizant Healthcare.

14 Q. Was that essentially immediately after  
15 graduation?

16 A. Yeah.

17 Q. So starting in two thousand -- early -- early  
18 2003?

19 A. Yeah, that sounds right.

20 Q. And at that point was Scott Augustine still  
21 involved in the company?

22 A. Yeah.

23 Q. He was a CEO?

24 A. Yeah, he would have been.

25 Q. How long have you known Scott Augustine?

1 ALBRECHT

2 A. I only knew him from the internship on.

3 Q. How had you gotten connected with Arizant for  
4 the internship?

5 A. Sure. My dad was -- shared a dorm with him  
6 in college. And they weren't close or  
7 anything, he just saw this guy in the paper  
8 that he used to know and said hey, if you're  
9 looking for internships, why don't you throw  
10 a resume in there and see if you get an  
11 internship. So I was given a tour of the  
12 company by Scott, and that was about it for a  
13 while of seeing him.

14 Q. And your internship, was that in the research  
15 and development area?

16 A. Yes, it was.

17 Q. Okay. So you -- you started in 2003 as a  
18 full-time employee. What was your title?

19 A. Research and development engineer.

20 Q. Okay. And how long did you work in that  
21 capacity for Arizant?

22 A. It was two-and-a-half years probably. I'd  
23 have to figure out the exact dates. It was  
24 two to three years, somewhere in there.

25 Q. And was -- did Scott Augustine remain the CEO

ALBRECHT

the entire time you were there?

A. No.

Q. Approximately what time did Dr. Augustine leave Arizant?

A. It would have been a little over a year before I took off, so I was only there for maybe a year and a half while he was CEO, year, year and a half.

Q. And then how long were you there when -- how long were you part of Arizant when Dr. Augustine was no longer part of Arizant?

A. I think a little over a year, maybe a year and a half. So somewhere in the two- to three-year range all that stuff happened before I switched jobs and went to work for him.

Q. Okay. And you stayed at Arizant in the -- after Dr. Augustine left in the same capacity?

A. Yup.

Q. Okay.

A. Yup.

Q. When you left Arizant, what was your next employment?

1 ALBRECHT

2 A. It was at Augustine Biomedical & Design, so  
3 that was with Scott Augustine.

4 Q. And how did it -- how did it come to pass  
5 that you went from Arizant to working for  
6 Augustine Biomedical?

7 A. I sought him out. He was recruiting  
8 engineers once his noncompete was up in terms  
9 of working with people from the company, so  
10 we had some discussions and it seemed like a  
11 fit.

12 Q. So when did you start at Augustine  
13 Biomedical?

14 A. I would have to look at dates on a resume if  
15 you have one. I think I provided one. But  
16 it would have been, I don't know, let's see  
17 here, 2002 -- '05, '06, somewhere in there, I  
18 believe.

19 Q. And what was your first position?

20 A. It was an engineer.

21 Q. In research and development?

22 MR. B. GORDON: And, Mark, you  
23 don't have to guess on things. If at any  
24 point you need to see a document to answer a  
25 question, just let us know.

1 ALBRECHT

2 THE WITNESS: Sure.

3 MR. C. GORDON: -- discrepancy to  
4 my attention.

5 BY MR. C. GORDON:

6 Q. So the table -- it still says table 2, right?

7 A. Yes.

8 Q. And those are the -- that -- that table 2  
9 there is the -- reflects the results of the  
10 impaction testing from what was actually  
11 coming out of the Bair Hugger, right?

12 A. Yes.

13 Q. And in describing the impaction results --  
14 first of all, who -- strike that.

15 Who actually authored the -- the --  
16 the text that's in here?

17 A. Well, my name is on it, so it's probably  
18 myself.

19 Q. Okay. So in describing what's shown in table  
20 2, you -- you said, "Little or no growth  
21 occurred on the agar plates"; is that  
22 correct?

23 A. In this situation it appears that way. There  
24 are standards you can reference for what they  
25 allow for impaction, I believe. It's been a

1 ALBRECHT

2 while since I've looked at the standards for  
3 the European ventilation tests. Most of  
4 these tests come from European sources.

5 Q. Why is that?

6 A. Because the NHS, they have stricter  
7 guidelines on their operating construction  
8 and testing there, I believe, than here.

9 Q. So when you say the NHS, you're talking  
10 about the National Health Service in the  
11 United Kingdom?

12 A. I believe so.

13 Q. Okay. So and in -- were the impaction -- was  
14 the impaction testing that you did on the --  
15 the Bair Hugger airstream, was that an  
16 attempt to find out if the -- the air coming  
17 out of the Bair Hugger would -- would comply  
18 with NHS standards?

19 A. I don't believe there are NHS standards for  
20 convective-warming equipment, but we were  
21 just observing what would be there. This is  
22 one of the earlier studies and we were unsure  
23 as what would even be found.

24 Q. And -- so, basically, to -- to kind of put it  
25 in simplistic terms, you're looking at three



1 ALBRECHT

2 things with respect to the Bair Hugger,  
3 particles that were coming out of it, bugs  
4 that were resident inside of it, and bugs  
5 that were coming out of it?

6 MR. B. GORDON: Object to form.

7 BY MR. C. GORDON:

8 Q. Is that accurate?

9 A. We were assessing filtration efficiency and  
10 that dealt with particles on the in and out  
11 stream, because that's very important in case  
12 there are resident airborne microbes that  
13 could be sucked in and delivered through.

14 We were looking to see if there were  
15 resident bacteria in the Bair Hugger or  
16 anything pathogenic. And we were interested  
17 in whether or not those were on the surfaces  
18 or whether we could detect them in the  
19 airflow.

20 Q. Okay. And, basically, you couldn't detect  
21 them in the airflow, correct?

22 A. In this study I don't see high counts, so,  
23 yes, it looks like they were -- well, we did  
24 have one or two counts, it looks like, but  
25 the control also had a count.

ALBRECHT

Q. Okay. So there were -- it looks like there were three Bair Huggers sampled?

A. Yup.

Q. Tell me what the -- the different sampling things mean there. There are -- for example, on the first one there's three actives and then there's a control. What's -- what do those mean?

A. So one would be sampling the air out of the Bair Hugger three times, and then the control I think would be an ambient sample of the operating theater air.

Q. Okay.

A. And I'd have to read carefully if you want a very precise answer.

Q. Actually, I do on this, yeah.

A. All right. (Reviews document.)

Okay. Go ahead and reask me the question.

Q. I'm just trying to understand the different counting lines. For example, in the first one for the Bair Hugger 505 CW 19808, the first line says, "Active," and under, "Sample start time," it says, "Zero," in brackets,

1 ALBRECHT

2 changes in the experimental setup, maybe  
3 there's something different with what's going  
4 on in the room, you just don't know.

5 Again, these studies were not  
6 designed to detect statistical differences  
7 necessarily on this set of them. This  
8 doesn't have, like, a sampling plan or  
9 anything in place that's a stat plan, other  
10 ones do.

11 Q. You did that, yeah, we'll get to -- that was  
12 done later.

13 So, basically, you were just looking  
14 to see are there any particles coming out  
15 and, you know, what -- in the -- in the -- in  
16 the three different size ranges?

17 A. Correct.

18 Q. And that's what you looked at in the OR  
19 ventilation system as well, right?

20 A. You do, but the source of particles are  
21 anticipated to be a little different. You  
22 know, the OR ventilation system is filtering  
23 out largely atmospheric dust as it comes from  
24 the outside.

25 The operating room has a very

1 ALBRECHT

2 different particle source that would be  
3 pulled into these units and put through, and  
4 that is -- a lot of the dust matter that you  
5 find in the actual operating theater after  
6 the atmospheric stuff has been cleaned  
7 relates to shed skin cells.

8 So the sources of the dust that the  
9 filters are acting on is different and so  
10 it's hard to draw conclusions and draw  
11 parallels between atmospheric dust when one  
12 system is intended to filter that out and  
13 skin cells and another system that's kind of  
14 pointed at a different kind of dust that it's  
15 assuming would be in the environment.

16 Q. Okay. Did -- so you -- you found that there  
17 were particles of various sizes, various  
18 counts coming out of the Bair Hugger?

19 A. We did.

20 Q. But you really didn't find much in the way of  
21 bacteria coming out?

22 A. We did not.

23 MR. B. GORDON: Object to the  
24 form.

25 MR. C. GORDON: Okay.

1 ALBRECHT

2 BY MR. C. GORDON:

3 Q. Did that surprise you?

4 A. No. We were unsure what we were looking for.  
5 We had no prior assumptions on what we should  
6 even expect.

7 Q. So --

8 A. What surprised me was the operating theater  
9 counts that we saw here that they needed to  
10 do a corrective action.

11 Q. Sure.

12 A. That was the surprising finding.

13 Q. So on this, which was probably the first  
14 study you did on Bair Huggers, you found  
15 particle emissions, but not much in the way  
16 of bacteria, virtually no bacteria?

17 A. In this study the counts were not elevated.

18 Q. Okay. With all that -- well, let me -- let  
19 me just actually -- actually ask you,  
20 Exhibit 2, the Hastings ventilation  
21 assessment, I'm -- I'm wondering about that  
22 second line. It says, "To get conclusive  
23 data, we analyzed three interrelated areas,  
24 the operating room's ventilation system air  
25 quality, the Bair Hugger unit's quality, and

1 ALBRECHT

2 Q. And some of the research you did looked at  
3 filtration efficiency, particles going in,  
4 particles going out, right?

5 A. Yeah, and it was not this data for the  
6 efficiency measures, yes.

7 Q. I understand. But that was one of the  
8 measurements that you published on --

9 A. Correct.

10 Q. -- particles?

11 A. I was a coauthor on a paper that was involved  
12 in that, yes.

13 Q. And one of the things you published on was  
14 bacterial CFUs that you were able to swab or  
15 rinse out of the internal surfaces of the  
16 Bair Hugger, right?

17 A. Correct.

18 Q. But you've never published anything about the  
19 presence or absence of bacteria in the actual  
20 airstream of the Bair Hugger, right?

21 A. I'm unsure. I'd have to look through our  
22 body of publications to confirm that.

23 Q. And as you sit here today, Mr. Albrecht, do  
24 you recall of any discussions after you had  
25 done these -- done these studies and gotten

1 ALBRECHT

2 these results where somebody suggested, you  
3 know, let's not look at the actual bacteria  
4 coming out of the Bair Hugger anymore?

5 MR. B. GORDON: Object to form,  
6 lack of foundation, calls for speculation.

7 THE WITNESS: I'm unsure. There  
8 may be discussions that were had. My  
9 memory -- it's a long time ago, I'm not sure.  
10 If you have something to help me pinpoint  
11 something, I'd be happy to discuss it.

12 BY MR. C. GORDON:

13 Q. Well, you were -- when you were doing the --  
14 the studies on the Bair Hugger, that was at  
15 a -- that was at a time when  
16 Augustine Biomedical & Design was launching  
17 and trying to sell its -- its warming device  
18 in the marketplace, right?

19 MR. B. GORDON: Objection to form,  
20 vague as to time what studies you're  
21 referring to.

22 BY MR. C. GORDON:

23 Q. All the studies you've done on Bair Hugger.

24 A. Yes --

25 Q. I'm -- that's a good point. All the studies

1 ALBRECHT

2 you've done on Bair Hugger when you were  
3 employed by Augustine Biomedical & Design,  
4 not when you were at Arizant.

5 A. There was a market launch and there was a  
6 product on the market at the time these  
7 studies were done, yes.

8 Q. And that product was HotDog, right?

9 A. Correct.

10 Q. Which is a competitive product to the  
11 Bair Hugger, right?

12 A. Correct.

13 Q. And any research that you might have done  
14 that raised any kind of questions about  
15 the -- either the safety or the efficacy of  
16 the Bair Hugger, that kind of research would  
17 have the potential to help out HotDog sales,  
18 wouldn't it?

19 MR. B. GORDON: Objection to form.

20 THE WITNESS: It's a promotional  
21 tool as to sales, yes.

22 BY MR. C. GORDON:

23 Q. And, certainly, you're aware that  
24 Augustine Biomedical and Dr. Augustine has  
25 promoted the HotDog as a safer alternative to



1 ALBRECHT

2 the Bair Hugger, correct?

3 MR. B. GORDON: Object to form.

4 THE WITNESS: Yes.

5 BY MR. C. GORDON:

6 Q. And one of the arguments that has been  
7 advanced by Augustine Biomedical and  
8 Dr. Augustine as to why the HotDog is safer  
9 than the Bair Hugger, is because the  
10 Bair Hugger emits a lot of particles --

11 MR. B. GORDON: Object to form.

12 BY MR. C. GORDON:

13 Q. -- and that doesn't -- there's no -- nothing  
14 that can emit particles from the HotDog  
15 system, right?

16 MR. B. GORDON: Object to form.

17 THE WITNESS: If you could show me  
18 the marketing research you're referring to  
19 for that or the advertisement, I'd feel free  
20 to comment, but that's kind of an open-ended  
21 statement.

22 BY MR. C. GORDON:

23 Q. So just as a general proposition, as you sit  
24 here today, you can't remember any kind of  
25 marketing activities undertaken by

1 ALBRECHT

2 that goes down, up a little bit --

3 A. I do.

4 Q. -- and then goes down? Would you agree that  
5 that conveys more information about what  
6 might have been happening in terms of SSI  
7 trends than an average -- an arithmetic mean  
8 average of SSI rates over whatever that time  
9 period is?

10 MR. B. GORDON: I'm going to  
11 object to the fact that you can't read  
12 anything on this except for the very first  
13 top line. I have no idea what you're talking  
14 about.

15 THE WITNESS: I understand the  
16 trendline and the series of events that  
17 follow with it that are showing on the graph.  
18 And from a graphic like this, one can look at  
19 a trendline from their eye on the top, it's  
20 hard to see on the bottom what's going on,  
21 though, in terms of the data.

22 I don't know. If you group  
23 everything at a very small granular level,  
24 things get kind of wonky too up and down. I  
25 think that adding to this paper those other

1 ALBRECHT

2 two effects would be reasonable, but other  
3 than that, I don't know if I would change  
4 anything based on that.

5 BY MR. C. GORDON:

6 Q. Well, I -- and I -- to Mr. Ben Gordon's  
7 point, you can't tell what those  
8 interventions --

9 A. It's observational data too. None of these  
10 are tested interventions. And because the  
11 rate went down may not be due to the fact  
12 that that happened there, and that's the  
13 devil of the details with these kind of  
14 things, they're observational. You don't  
15 know if that did it or something else, so,  
16 really, you need that randomized trial. And  
17 this data suffers from the same problem, it  
18 is observational. It is not controlled in a  
19 randomized trial.

20 Q. When did you first meet Andrew Legg?

21 A. It would have had to have been in the UK when  
22 I was there. I don't think he was stateside  
23 when I first met him. I think it was  
24 correspondence by e-mail maybe.

25 Q. How did you first get in touch with him?

1 ALBRECHT

2 A. Similar to McGovern and Paul, I'm sure it  
3 would be that same channel. So it was either  
4 through Scott Augustine, maybe David Leaper.  
5 I'm not sure who kind of hooked us up.

6 Q. And you went to Sheffield where --

7 A. Yes.

8 Q. -- where he was, right?

9 A. Uh-huh. Yes.

10 Q. And you met Dr. Hamer as well?

11 A. Yes. I don't remember if I shook his hand or  
12 if I just met him over e-mails.

13 Q. Okay. But you and Legg collaborated on -- on  
14 research involving forced-air warming?

15 A. We did. I was not a listed author in those  
16 studies.

17 Q. And by, "Those studies," I just want to be  
18 clear, there's Legg and Hamer, and then  
19 there's Legg, Cannon and Hamer.

20 A. Yes.

21 Q. You collaborated on both of those, right?

22 A. I collaborated, I believe, on one of the two.  
23 You'd have to show me the studies so I can  
24 look at the setup on them, if you have them.  
25 I could tell you then which elements I was

1 ALBRECHT

2 involved in and not. We did provide them  
3 with some research materials.

4 Q. And -- in the interest of time, I'm not going  
5 to looking for them so we can delay this, but  
6 did the -- well, strike that.

7 MR. C. GORDON: We'll suspend for  
8 now.

9 MR. B. GORDON: Okay. We're going  
10 to reserve questions for another day. Thank  
11 you very much.

12 MR. C. GORDON: Do you want to try  
13 and schedule now or --

14 THE WITNESS: Yeah, I think now  
15 would be best just so we know.

16 THE VIDEOGRAPHER: We're going off  
17 the record at 3:11 p.m.

18 (Whereupon, the foregoing  
19 deposition adjourned at 3:11 p.m.)  
20  
21  
22  
23  
24  
25

# Exhibit J

**AFFIDAVIT**

STATE OF MINNESOTA

)

COUNTY OF HENNEPIN

)

)

Scott Douglas Augustine, being duly sworn on his oath, states as follows:

1. My name is Scott Douglas Augustine. I am a medical doctor specializing in anesthesiology.
2. In 1984 I invented the medical device that came to be known as Bair Hugger patient warming. Through my company (initially called Augustine Medical, Inc. but now called Arizant, Inc.), I introduced forced-air patient warming ("FAW") to America and the world. Through our support of clinical research, medical professionals have come to understand the importance of maintaining the patient's core body temperature during surgery.
3. In 2004 I sold my interest in Arizant. I no longer have any affiliation with the company or with the Bair Hugger product. Subsequent to selling my interest in Arizant, however, I learned of several significant problems with FAW and with the Bair Hugger system in particular. Many of the problems are detailed in the MDR filed by Dr. Robert Gauthier.
4. At the 2007 meeting of the American Association of Anesthesiologists, I communicated to several employees of Arizant the information contained in the brochure entitled "Blowing Air Is Risky!" Such information included the following:
  - A department of public health in the U.S. called Bair Hugger blowers "reservoirs of infection."
  - Particle counters measured more than 50 million bacteria-sized particles per hours spewing from Bair Hugger blowers.
  - An outbreak of multi-drug resistant *Acinetobacter* had been traced to the inside of Bair Hugger blowers, as reported in *Infection Control and Hospital Epidemiology*.
  - Germ colonies could be cultured by swabbing inside Bair Hugger units and by impacting the air blown from the hose on a culture plate.

Copies of the brochure were provided to several Arizant employees, including senior management.

5. In 2009, in order to determine the extent of contamination of Bair Hugger blowers, doctors arranged to sample the blowers used in the University Hospital in Caen, France. The day before the sampling of the blowers was to begin, however, I learned that all 80 of the blowers had been removed from service by Arizant and replaced with new blowers. The contamination testing, of course, was cancelled. Based on an approximate retail cost of \$1,400, the effort to avoid disclosure of the contamination cost Arizant \$112,000.

6. A similar event occurred in England in 2010. There, orthopedic surgeon Michael Reed was scheduled to begin sampling Bair Hugger blowers for contamination at a National Health Service hospital in Northumbria. Shortly before the sampling could begin, however, the blowers were removed from the hospital by Arizant.

7. Beginning in 2009, UK surgeon Prof. David Leaper lead a team conducting research regarding bacterial contamination of Bair Hugger blowers and the impact of waste hot air from FAW blowers on laminar flow. Dr. Leaper's research was published in *Orthopedic Reviews* and has been accepted for publication in the *American Journal of Infection Control*. In 2010, however, I began receiving reports that Dr. Leaper had been verbally abused by Arizant employees because of his research. I also learned that Dr. Leaper met with Arizant executive Robert Buehler and was asked, among other things, to conduct research for Arizant. Shortly thereafter, in June, 2010, Dr. Leaper informed me that he was withdrawing from all further research regarding the contamination of FAW blowers and laminar flow disruption.

8. At the 2009 meeting of the American Society of Anesthesiologists I communicated to several executive employees of Arizant that the waste heat from FAW destroys the protection of the laminar flow ventilation used in ultra-clean operating rooms. Several watched the video that is attached to the MDR filed by Dr. Gauthier as Annex L. Arizant Chief Scientist Al Van Duren watched the video several times, commenting only, "I didn't know that," and "I didn't think the air would do that."

9. Because of my years as CEO of Arizant, I am aware of the company's practice of removing FAW blowers from the field after several years of use, "refurbishing" them by replacing filters and hoses, checking electronics, and



Copies of the brochure were provided to several Arizant employees, including senior management.

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9. Because of my years as CEO of Arizant, I am aware of the company's practice of removing FAW blowers from the field after several years of use, "refurbishing" them by replacing filters and hoses, checking electronics, and

cleaning the exterior of the blower—and then returning the blowers to the field, often to a different hospital. To my knowledge, the interior air-flow path of the blower is not cleaned during this “refurbishment” process. While I cannot be precise, I estimate that a significant percentage of the blowers in use in the United States are “refurbished.”

Dated: July 1, 2010

Scott Augustine MD  
Signature

Name: Scott Augustine

Address: 9017 Cavell Cir.

City/State/Zip: Bloomington, MN 55438

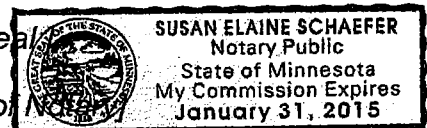
Telephone: 612-465-3502

Subscribed and sworn to before me, this 1<sup>st</sup> [day of month]  
day of July [month], 20 10.

Susan Elaine Schaefer

[Notary Seal]

[signature of Notary]  
[typed name of Notary]



NOTARY PUBLIC

My commission expires: 1/31, 20 15.

# Exhibit K



To: Dechert LLP

Fax: +44 (0) 20 7184 7001

From: J. Randall Benham

Date: July 07, 2010

Re: Your letter to Nordic Surgical Ltd Ref: 960337/348875

Dear Sirs:

As general counsel of Hot Dog International, I am writing on behalf of Nordic Surgical Ltd. and Steve Hammant-Stacy in response to your letter dated June 23, 2010.

After thorough review of each of the statements to which you have objected, we have concluded that no clarification or retraction is required. Although some of the characterizations in your letter do not accurately reflect the statements actually made, each of the actual statements is accurate.

Your threatening letter, moreover, is merely another attempt by your client to suppress the facts. They have been aware of the bacterial contamination of their blowers for more than two years. They were informed in October 2009 of the disruption to laminar flow ventilation caused by waste heat from Bair Hugger blowers. Rather than deal with these problems straightforwardly, they have chosen threats, denial and obfuscation. These responses are inappropriate. This is not a marketing issue; it is a question of patient safety.

We do agree, however, that the facts underlying the statements should be reviewed by the appropriate regulators. For that reason, we are pleased that a clinician in the United States has filed an adverse event report regarding Bair Hugger blowers with the Food and Drug Administration, providing full support for each of the statements. We anticipate that a similar report will be filed with appropriate regulators the UK and elsewhere within the next few days.

Sincerely,

  
J. Randall Benham,  
General Counsel  
Hot Dog International LLC

Hot Dog International  
6581 City West Parkway  
Eden Prairie, MN 55344  
U.S.A.

# Exhibit L

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF MINNESOTA

3 -----  
4 In Re:  
5 Bair Hugger Forced Air Warming  
6 Products Liability Litigation

7 This Document Relates To:

8 All Actions MDL No.  
9 15-2666 (JNE/FLM)  
10 -----

11 VIDEOTAPED DEPOSITION

12 OF

13 ROBERT L. GAUTHIER, M.D.

14 VOLUME 1

15 Minneapolis, Minnesota

16 Tuesday, October 4th, 2016  
17 -----  
18  
19  
20  
21  
22  
23

24 Reported by:  
25 Amy L. Larson, RPR  
Job No. 112501

1  
2 APPEARANCES:

3 ON BEHALF OF 3M:

4 COREY GORDON, ESQUIRE

PETER GOSS, ESQUIRE

5 BLACKWELL BURKE

431 South Seventh Street

6 Minneapolis, MN 55415

7  
8  
9 FOR THE PLAINTIFF:

10 JAN CONLIN, ESQUIRE

CIRESI CONLIN

11 225 South 6th Street

Minneapolis, MN 55402

12  
13  
14 ALSO PRESENT: Dean Hibben, Videographer

Katie O'Brien

15 (via teleconference)

Gabriel A. Assaad, Esq.

16 Ben Gordon, Esq.  
17  
18  
19  
20  
21  
22  
23  
24  
25

GAUTHIER

inflating and the deflating sit relative to the patient?

A. They're all on the anesthesia, if you will, tower. It kind of depends from OR to OR. Usually, they're either integrated into the gas machine, a lot of them these days, or if you have separate unit it sits on a shelf away from the patient, again.

MS. CONLIN: When you're ready to take a break, we've been going a couple of hours.

MR. GORDON: Thank you. I tend to be the energizer bunny who just keeps going and going, so --

MS. CONLIN: Yeah --

MR. GORDON: You can -- you can -- you can say --

THE WITNESS: You know what, a bathroom break would be really good for all parties.

THE VIDEOGRAPHER: We're going off the record at 11:14 a.m.

(Whereupon, a brief recess was taken.)



1 GAUTHIER

2 (Whereupon, Exhibit 4 was  
3 marked for identification.)

4 THE VIDEOGRAPHER: This is  
5 video number 2 in the deposition of  
6 Dr. Robert Gauthier taken on October 4th,  
7 2016. The time now is 11:25 a.m.

8 BY MR. GORDON:

9 Q. Dr. Gauthier, I handed you what's been marked  
10 now as Exhibit 5.

11 A. Mine says 4.

12 Q. Yes. Thank you.

13 A. Okay.

14 Q. I'm not too good with numbers.

15 A. Come on, you are supposed to be the guys that  
16 are on the details. I'm not a detail guy.

17 Q. This is a document you authored, correct?

18 A. Along with others, yes.

19 Q. Tell me who the others were.

20 A. Well, I believe Randy Benham had a lot to do  
21 with the formation, or he and Scott  
22 Augustine.

23 Q. When was that that you -- you and Mr. Benham  
24 and Mr. Augustine wrote Exhibit 4?

25 MS. CONLIN: It's Exhibit 5, isn't

1 GAUTHIER

2 it?

3 THE WITNESS: No, 4.

4 MR. GORDON: He was right, I was  
5 wrong.

6 THE WITNESS: Pay attention.

7 MR. GORDON: Pay no attention to  
8 me.

9 MS. CONLIN: I apologize. You  
10 might want to restate the question so you  
11 have a clean record.

12 MR. GORDON: Okay.

13 BY MR. GORDON:

14 Q. When did you and Mr. Benham and Mr. Augustine  
15 first undertake to author Exhibit 4?

16 A. I don't recall exactly. Generally, I think  
17 it was after the smoke study, sometime after  
18 that.

19 Q. What do you mean by the smoke study?

20 A. The -- the disruption of the -- I refer to  
21 the studies by how we did them, and the  
22 disruption by hot air of the operating room,  
23 that was essentially incensed smoke, a  
24 HotDog -- or, I mean, a Bair Hugger and, you  
25 know, a mannequin and then a person standing

GAUTHIER

A. Correct, although --

MS. CONLIN: Objection; calls for speculation.

THE WITNESS: Okay. Well, here's what I'd say on that. More stuff blew out of the -- there was more stuff in that air when that hose was blowing than there wasn't, so something was getting in the air.

BY MR. GORDON:

Q. Okay. When you say stuff, you're talking about --

A. Particles. Particles.

Q. And you say they tried to somehow measure whether there was any colony-forming units coming out, but for some reason they weren't able to measure that?

A. It's hard to come up with a scientifically valid way to distribute it from the blower to the -- to the film. I think swabbing was our first step. Particles was our first step. To be honest, at that time we weren't even sure what we were going to find.

Q. Okay. In this document you created you along with Mr. Benham and Mr. Augustine, if you'd

GAUTHIER

turn to page 3.

A. Okay.

(Whereupon, Exhibit 5 was  
marked for identification.)

BY MR. GORDON:

Q. Now I'm going to show you Exhibit 5.

A. Okay.

Q. This is a -- this is a study that you  
actually quoted in this letter, right?

A. Uh-huh.

Q. On page 3?

A. Yes, yes. Sorry.

Q. Page 3 of Exhibit 4, the document that you  
and Mr. Benham and Mr. --

A. Yeah. I'm just reading it right now again.

Q. Fair enough.

A. (Reviews document.) Yes.

Q. Okay. So if you look at page 3 of -- of  
Exhibit 4 --

A. Yes.

Q. -- the Gauthier/Benham/Augustine document --

A. Yes.

Q. -- this was intended -- by the way, Exhibit 4  
was intended to be submitted to the FDA,

GAUTHIER

correct?

A. Correct.

Q. Was any version of this ever submitted to the FDA?

A. I believe it was. I signed it to send it to there, I gave it to them. I don't know if they submitted it.

Q. Okay. More than one? Have you submitted more than one of these --

A. Me personally, no.

Q. -- MedWatch reports?

A. Me personally, no.

Q. All right. So --

A. Not that I'm aware of.

Q. So on page 3 under, Early Research, it talks about, "In 1997 M.S. Avidan cultured pathogen organisms from the air blown from 40 percent of 40" -- "of forced air warm" -- "forced air blowers, stating as follows," then there's a quote there, right?

A. Yeah.

Q. Did you -- were you the person who actually decided how to write this and how to excerpt this particular quote?

GAUTHIER

A. They wrote it, I edited it. I toned it down, if you will.

Q. Did you actually compare what -- how they quoted it, the Avidan study to what was actually said in the Avidan study?

A. I can't recall --

Q. Okay.

A. -- to be honest.

Q. Well, let's -- let's take a look at it. I want you to compare the quote --

A. Okay.

Q. -- on page 3 of Exhibit 4 --

A. Okay.

Q. -- where it starts, "We conclude that these warming devices are a potential source of nosocomial infections."

A. Okay.

Q. And if you look at the --

A. Yeah, it's in the Summary.

Q. -- Summary of page 3, there's that same line, "We conclude that these warming devices are a potential source of nosocomial infections" -- "of infection."

Now, on the quote that is in your

GAUTHIER

letter to the FDA, after that sentence there  
are three ellipses --

A. Yes.

Q. -- and in parenthesis, "And suggesting that  
a," three more ellipses, "microbial filter  
fitted to the nozzle of the hose could be  
incorporated into the design of the warmer to  
reduce the risk of contamination."

A. Correct.

Q. Looking at the actual Avidan paper, could you  
read the -- the language that was -- that was  
omitted --

A. Okay.

Q. -- by these ellipses?

A. Yes. "We conclude that these warming devices  
are a potential source of nosocomial  
inflammation," that's already in there.

"They should only be used in conjunction with  
perforated blankets, should have their  
microbial filters changed regularly and their  
hoses sterilized."

Q. That doesn't say or even in --

A. Correct.

Q. -- rough paraphrase, "And suggesting that,"

GAUTHIER

which is how this is -- that omitted sentence is characterized --

A. Correct.

Q. -- correct?

And, in fact, the Avidan study concluded, although they were able to culture some CFUs from some of the airstreams from the hose itself, once they put the blanket on, they couldn't culture out any colony-forming units, correct?

A. And the question I -- yes. And I would raise the question, because this is why -- one of the reasons we raise this is nobody changes the hoses, nobody changes the filters. We asked at the hospitals we went to when is the last time you changed the hoses and they said we weren't aware you needed to do that.

Q. Okay. But in this letter that -- that you coauthored for the FDA, you reference the -- this 1997 Avidan study, Exhibit 5, as having cultured pathogen organisms from the air blown from 40 percent of forced air blowers, and then there's this quote that omits that sentence about they should only be used in



GAUTHIER

conjunction with perforated blankets, and there's no indication in the FDA letter that the Avidan study actually showed that although they did culture organisms from 40 percent of the blowers, once they put the blanket on they got zero bugs?

A. Yes.

Q. That doesn't -- nowhere does that appear in the FDA letter?

A. Right. And you are aware that there are a number of places that use the blowers without the blankets, it's called hosing.

Q. And that --

A. It's out of your control, it's out of everybody's control. We have told them multiple times don't do that.

Q. And, in fact, the instructions for use repeatedly --

A. Say don't do that, yes. We all agree on that. But as we say in manufacturing, if you make it idiot proof, they'll make a better idiot, and people do stupid things with these things.

Q. On the fourth page of Exhibit 4, at the top

GAUTHIER

this letter that you coauthored references a letter from N. Baker and D. King about -- and it quotes them saying that, "All of the blowers resulted in heavy growth of bacteria." Do you see that?

A. Yes.

Q. Now, again, would that have been something that Mr. Benham and Dr. Augustine came up with and --

A. They -- they put together the research on it, yes.

Q. Are you aware of the fact that the Baker and King letter was about the WarmTouch and not about Bair Hugger?

A. No, I'm not aware of that.

Q. Would you agree that when you look at the page 3, this early research, and it says, "Several researchers raised issues regarding the safety of Bair Hugger blowers and demanded a design change," and then the second study that is referenced is Baker, King?

A. The Baker, King? I was going to see if they -- because they used one --

GAUTHIER

Q. You're looking at Avidan. I'll --

A. Oh, okay.

Q. I'll give you Baker.

A. Okay. But in the Avidan there was -- wasn't there one WarmTouch in that study too?

Q. There was, in fact.

A. Yeah, yeah.

Q. But there were Bair Huggers in the Avidan one.

A. Yeah.

Q. But there were no Bair Huggers --

A. Well, yeah, there were nine Bair Huggers and one WarmTouch.

(Whereupon, Exhibit 6 was  
marked for identification.)

BY MR. GORDON:

Q. I'll show you now Exhibit 6.

A. Okay.

Q. And that -- that is in fact the 2002 Baker and King study that's referenced on page 4 of Exhibit 4, correct?

A. Uh-huh.

Q. And would you agree that the study that the -- or the -- the review that was

GAUTHIER

different blower, technically right. Kind of in the spirit of worrying about this, I would disagree, because we've looked at these units, they're all roughly the same, they all get contaminated. And, again, the issue of writing the letter had more to do with somebody changing the filter.

Q. Well, the letter was specifically about Bair Hugger, correct?

A. Right, because Bair Hugger changed the filter.

Q. And if the FDA had taken any action in response to this letter that you and Mr. Benham and Dr. Augustine authored, that would have been -- that could have enured to Dr. Augustine's benefit in terms of increased sales of his competing product, right?

MS. CONLIN: Objection; calls for speculation.

THE WITNESS: I was just going to say yes, and it would have hurt the only stock I held at that time, which was 3M.

BY MR. GORDON:

Q. And given --

1 GAUTHIER

2 THE WITNESS: It would have been  
3 to his benefit though, in all fairness.

4 BY MR. GORDON:

5 Q. And would you agree that when you're  
6 submitting something to the FDA and when  
7 you've got -- first of all, when it was  
8 ultimately signed, you were the only one who  
9 signed it, right?

10 A. Correct.

11 Q. There was no indication in what was actually  
12 submitted to the FDA that Dr. Augustine had  
13 anything to do with authoring it, correct?

14 A. Correct.

15 Q. Nor was there any indication that  
16 Randy Benham had anything to do with it,  
17 correct?

18 A. Correct. Although, I believe the form is  
19 only one persons signs it, isn't it? I  
20 believe that's how it went, that's why.

21 Q. Who is Benham?

22 A. Randy is legal counsel part-time with the  
23 company. He works within the company. He's  
24 been with Scott a long time.

25 Q. What's your understanding as to why

1 GAUTHIER

2 Randy Benham was participating in authoring  
3 this MDA watch report -- MedWatch report?

4 MS. CONLIN: Objection; calls for  
5 speculation.

6 THE WITNESS: Yeah, I would be  
7 speculating why.

8 BY MR. GORDON:

9 Q. Did it surprise you that a lawyer would be  
10 participating in writing this?

11 A. Actually, it would give me more comfort,  
12 because it would seem that he would make sure  
13 that we didn't make any stupid claims.

14 Q. Well --

15 A. I trust the legal profession.

16 Q. Let's look at the next claim in this MedWatch  
17 report.

18 (Whereupon, Exhibit 7 was  
19 marked for identification.)

20 BY MR. GORDON:

21 Q. Let me show you now Exhibit 7.

22 A. Okay.

23 Q. The -- the next study that's included in this  
24 Gauthier/Benham/Augustine letter to the FDA  
25 is the 2003 Scherrer, et al., paper, correct?

# Exhibit M

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

TIMOTHY JOHNSON,

*Plaintiff,*

V.

3M COMPANY; AND ARIZANT  
HEALTHCARE, INC.

*Defendants.*

Civil Action No. 2:14-cv-02044-KHV-KGS

**NOTICE OF THIRD-PARTY SUBPOENA AND VIDEOTAPED DEPOSITION OF  
SCOTT AUGUSTINE, M.D.**

TO: ALL COUNSEL OF RECORD

DEPONENT: Scott Augustine, M.D.

DATE & TIME: October 13, 2015 at 9:00 am (CST)

PLACE: Blackwell Burke P.A.  
431 South Seventh Street, Suite 2500  
Minneapolis, MN 55415

PLEASE TAKE NOTICE that pursuant to Fed. R. Civ. P. 45(b)(1), Defendants 3M Company and Arizant Healthcare, Inc. hereby give notice that they intend to serve a subpoena to testify at a deposition and to produce documents on Third-Party, Scott Augustine, M.D. Attached hereto is a true and correct copy of the subpoena that is being served. The deposition will be recorded stenographically and videographically and will continue from day-to-day until completed. You are notified to appear and take such part in the examination as may be fit and proper.



PLEASE TAKE FURTHER NOTICE, the deponent is asked to bring to the deposition the documents in his possession as described in the attached Exhibit "A" regarding the above-referenced case.

This 23<sup>rd</sup> day of July, 2015.

Respectfully submitted,

By: 

Lori G. Cohen\*  
Christiana C. Jacxsens\*  
Evan C. Holden\*  
GREENBERG TRAURIG, LLP  
Terminus 200  
3333 Piedmont Road N.E., Suite 2500  
Atlanta, GA 30305  
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\* Admitted *pro hac vice*

Stephen J. Torline KS #18292  
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[mcrabb@ktklattorneys.com](mailto:mcrabb@ktklattorneys.com)

COUNSEL FOR DEFENDANTS 3M  
COMPANY, AND ARIZANT  
HEALTHCARE INC.

**CERTIFICATE OF SERVICE**

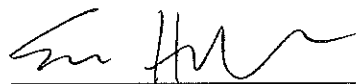
The undersigned hereby certifies that a true and correct copy of the foregoing has been served on all counsel of record via email and first class mail on July 23, 2015.

Michael L. Sexton, Esq.  
Sexton & Shelor  
6901 Shawnee Mission Parkway, Suite 111  
Shawnee Mission, KS 66202

David W. Hodges  
Gabriel Assaad  
Kennedy Hodges, LLP  
711 W. Alabama Street  
Houston, Texas 77006

Kyle Farrar  
Mark Bankston  
Farrar & Ball, LLP  
1010 Lamar Street, Suite 1600  
Houston, Texas 77002

*Attorneys for Plaintiff*

A handwritten signature in black ink, appearing to read 'Evan C. Holden', is written over a horizontal line.

Evan C. Holden

**EXHIBIT “A”**

**DEFINITIONS**

1. “Person” as used in these Requests means all natural persons, corporations, partnerships, trusts, or other associations, and all other entities.
2. “You” and “your” as used in these Requests means Scott Augustine, M.D., his representatives, administrative or personal assistants, agents, legal representatives, and all other persons acting on his behalf or under his direction or supervision.
3. “Timothy Johnson” as used in these Requests means Timothy Johnson, his representatives, administrative or personal assistants, agents, legal representatives, and all other persons acting on his behalf or under his direction or supervision.
5. “Communication” means and includes any and all direct or indirect transmissions of information by any means, written, oral or otherwise.
6. “Correspondence” means and includes all letters, notes, e-mails, text messages, memoranda or other written, typewritten, printed or reproduced material.
7. “Document” as used in these Requests includes without limitation, all written, printed, typed, photostatic, photographed, recorded, telecopied, photocopied or graphic materials of any kind, whether comprised of letters, words, numbers, pictures, sounds or symbols or any combination thereof. Without limiting the generality of the foregoing, the term “Document” includes without limitation, any book, pamphlet, binder, periodical, letter, email, text message, blog, memorandum, telegram, telex, report, envelope, intraoffice or interoffice communication, handwritten or other notes, working papers, transcription, draft, account, ledger, chart, paper, study, survey, index, tape, disc, photograph, computer printout, computer program and data files, microfilm, microfiche, correspondence, mailers, ledger cards, business cards, diaries, calendars, address and telephone records, drawings and charts and other data compilations. The term “other data compilations” includes information stored in, or accessible through, computer or other information retrieval systems, whether or not in hard copy form, together with instructions and all other materials necessary to use or interpret such data compilations. If more than one copy of any document exists, and if as a result of handwritten additions and notations, or for any other reason, the copies are not identical, each non-identical copy is a separate document and should be separately identified.
8. “Related to” or “relating to” shall mean directly or indirectly embodying, mentioning or describing, pertaining to, referring to, consisting of, being connected with or reflecting upon a stated subject matter.
9. “The Case” shall mean the lawsuit *Timothy Johnson v. 3M Company and Arizant Healthcare Inc.*, currently pending in the U.S. District Court for the District of Kansas, Docket No. 2:14-cv-02044-KHV-KGS.

10. “Defendants” shall be deemed to include, but without limitation, Defendants 3M Company and/or Arizant Healthcare Inc., including their predecessor companies, and each of their employees, agents, officers, directors, representatives, consultants, accountants, and attorneys, including any person who served in any such capacity at ANY time.
11. “Augustine Biomedical” shall be deemed to include, but without limitation, Augustine Biomedical & Design, LLC, Augustine Temperature Management LLC, Hot Dog USA, LLC, and Hot Dog International, including their predecessor companies, parent and/or subsidiary companies, and each of their employees, agents, officers, directors, representatives, consultants, accountants, and attorneys, including any person who served in any such capacity at ANY time.
12. “And” means “and/or” and “or” means “and/or.” The plural of any word used herein includes the singular and the singular includes the plural. The masculine gender of any word used here includes the feminine. The past tense of a verb used herein includes the present tense, and the present tense includes the past tense.

### REQUESTS

Unless otherwise specified below, the relevant time period for each Request is the period beginning on January 1, 2005 to the present.

1. Any and all documents, transcripts, medical records, court filings, discovery, or other documents from the lawsuit *Timothy Johnson v. 3M Company and Arizant Healthcare Inc.* that you have received or reviewed.
2. Any and all documents constituting, relating or referring to any communications, meetings, interactions, services or payments exchanged, or agreements between (a) You, Augustine Biomedical, or any other person or entity acting on Your behalf; and (b) the law firms Kennedy Hodges, LLP and/or Farrar & Ball, LLP and/or Sexton & Shelor, including but not limited to calendar entries, invoices, emails, letters, documents exchanged, and meeting notes.
3. Any and all communications regarding forced air warming between (a) You, Augustine Biomedical, or any other person or entity acting on Your behalf; and (b) the U.S. Food and Drug Administration (FDA).
4. Any and all communications regarding forced air warming between (a) You, Augustine Biomedical, or any other person or entity acting on Your behalf; and (b) the Office of Inspector General, U.S. Department of Health & Human Services.
5. Any and all communications regarding forced air warming and/or the Defendants between (a) You, Augustine Biomedical, or any other person or entity acting on Your behalf; and (b) the ECRI Institute.
6. Any and all communications regarding forced air warming and/or Dr. Farhad Memarzadeh between (a) You, Augustine Biomedical, or any other person or entity acting on Your behalf; and (b) the National Institutes of Health (NIH).

7. Any and all communications regarding forced air warming and/or the Defendants between (a) You, Augustine Biomedical, or any other person or entity acting on Your behalf; and (b) the United Kingdom Medicines and Healthcare Products Regulatory (MHRA).
8. Any and all communications regarding forced air warming between (a) You, Augustine Biomedical, or any other person or entity acting on Your behalf; and (b) any newspapers.
9. Any and all communications regarding the article "Forced-air warming does not worsen air quality in laminar flow operating rooms," Sessler DI, Olmsted RN, Kuelpmann R. (Anesth Analg. 2011 Sep 29), between (a) You, Augustine Biomedical, or any other person or entity acting on Your behalf; and (b) any editors, employees, or other persons affiliated with the journal *Anesthesia & Analgesia*.
10. Any and all documents, including correspondence and draft correspondence, related to the MedWatch report referenced in Your July 9, 2010 letter to Kurt Hilzinger, Court Square Capital Partners.
11. Any and all documents, data, photographs, or video relating to the production of any videos posted to <http://heat-rises.blogspot.com> that claim to show disruption of operating room airflow by forced-air warming, including footage taken but not posted online, documentation regarding the test protocols, documentation regarding all aspects of the ventilation system of the operating room and its performance, and documentation regarding the forced air warming blower and blankets used and any adjustments made to the devices.
12. Any and all social media postings, messages, and blog entries, posted by You, Augustine Biomedical, or any other person or entity acting on Your behalf, that reference or relate to forced-air warming or to the lawsuit *Timothy Johnson v. 3M Company and Arizant Healthcare Inc*, from January 1, 2013 to today.
13. Any and all electronic or paper files and file folders related to the lawsuit *Timothy Johnson v. 3M Company and Arizant Healthcare Inc*.
14. Any and all documents reviewed by you in preparation for this deposition.
15. Your current and up-to-date resume or Curriculum Vitae.

AO 88A (Rev. 02/14) Subpoena to Testify at a Deposition in a Civil Action

## UNITED STATES DISTRICT COURT

for the  
District of Kansas

TIMOTHY JOHNSON

*Plaintiff*

v.

3M COMPANY and ARIZANT HEALTHCARE, INC.

*Defendant*

Civil Action No. 2:14-cv-02044-KHV-TJJ

## SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: Scott Augustine, M.D.

(Name of person to whom this subpoena is directed)

☒ **Testimony:** **YOU ARE COMMANDED** to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

Place: Blackwell Burke P.A. 431 South Seventh Street, Suite 2500 Minneapolis, MN 55415	Date and Time: 10/13/2015 9:00 am
--	--------------------------------------

The deposition will be recorded by this method: Audio &amp; Video

☒ **Production:** You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and must permit inspection, copying, testing, or sampling of the material: See attached Exhibit "A"

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 7/23/15

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing (name of party) 3M COMPANY and ARIZANT HEALTHCARE, INC., who issues or requests this subpoena, are:

Evan C. Holden, Greenberg Traurig, 3333 Piedmont Road NE, Atlanta, GA 30305, holdene@gtlaw.com, (678) 553-7320

## Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

AO 88A (Rev. 02/14) Subpoena to Testify at a Deposition in a Civil Action (Page 2)

Civil Action No. 2:14-cv-02044-KHV-TJJ

**PROOF OF SERVICE***(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)*

I received this subpoena for *(name of individual and title, if any)* \_\_\_\_\_  
 on *(date)* \_\_\_\_\_.

☐ I served the subpoena by delivering a copy to the named individual as follows: \_\_\_\_\_

\_\_\_\_\_ on *(date)* \_\_\_\_\_; or

☐ I returned the subpoena unexecuted because: \_\_\_\_\_

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also  
 tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of  
 \$ \_\_\_\_\_.

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ 0.00 .

I declare under penalty of perjury that this information is true.

Date: \_\_\_\_\_

\_\_\_\_\_  
*Server's signature*

\_\_\_\_\_  
*Printed name and title*

\_\_\_\_\_  
*Server's address*

Additional information regarding attempted service, etc.:



**Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)****(c) Place of Compliance.**

**(1) For a Trial, Hearing, or Deposition.** A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

- (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
- (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
  - (i) is a party or a party's officer; or
  - (ii) is commanded to attend a trial and would not incur substantial expense.

**(2) For Other Discovery.** A subpoena may command:

- (A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and
- (B) inspection of premises at the premises to be inspected.

**(d) Protecting a Person Subject to a Subpoena; Enforcement.**

**(1) Avoiding Undue Burden or Expense; Sanctions.** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

**(2) Command to Produce Materials or Permit Inspection.**

**(A) Appearance Not Required.** A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

**(B) Objections.** A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

- (i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.
- (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

**(3) Quashing or Modifying a Subpoena.**

**(A) When Required.** On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
- (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden.

**(B) When Permitted.** To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

**(C) Specifying Conditions as an Alternative.** In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

**(e) Duties in Responding to a Subpoena.**

**(1) Producing Documents or Electronically Stored Information.** These procedures apply to producing documents or electronically stored information:

**(A) Documents.** A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

**(B) Form for Producing Electronically Stored Information Not Specified.** If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

**(C) Electronically Stored Information Produced in Only One Form.** The person responding need not produce the same electronically stored information in more than one form.

**(D) Inaccessible Electronically Stored Information.** The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

**(2) Claiming Privilege or Protection.**

**(A) Information Withheld.** A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

- (i) expressly make the claim; and
- (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

**(B) Information Produced.** If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

**(g) Contempt.**

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.



**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION**

TOMMY WALTON,

*Plaintiff,*

Y.

3M COMPANY; ARIZANT  
HEALTHCARE, INC.; AND  
ROBERT PRESTERA

*Defendants.*

Civil Action No. 4:13-cv-1164

**NOTICE OF THIRD-PARTY SUBPOENA AND VIDEOTAPED DEPOSITION OF  
SCOTT AUGUSTINE, M.D.**

TO: ALL COUNSEL OF RECORD

DEPONENT: Scott Augustine, M.D.

DATE & TIME: October 15, 2015 at 9:00 am (CST)

PLACE: Blackwell Burke P.A.  
431 South Seventh Street, Suite 2500  
Minneapolis, MN 55415

PLEASE TAKE NOTICE that pursuant to Fed. R. Civ. P. 45(b)(1), Defendants 3M Company, Arizant Healthcare, Inc. and Robert Prestera hereby give notice that they intend to serve a subpoena to testify at a deposition and to produce documents on Third-Party, Scott Augustine, M.D. Attached hereto is a true and correct copy of the subpoena that is being served. The deposition will be recorded stenographically and videographically and will continue from day-to-day until completed. You are notified to appear and take such part in the examination as may be fit and proper.

PLEASE TAKE FURTHER NOTICE, the deponent is asked to bring to the deposition the documents in his possession as described in the attached Exhibit "A" regarding the above-referenced case.

This 23<sup>rd</sup> day of July, 2015.

Respectfully submitted,

By: 

Lori G. Cohen\*  
Christiana C. Jacxsens\*  
Evan C. Holden\*  
GREENBERG TRAURIG, LLP  
Terminus 200  
3333 Piedmont Road N.E., Suite 2500  
Atlanta, GA 30305  
(678) 553-2385  
(678) 553-2386 Facsimile  
[cohenl@gtlaw.com](mailto:cohenl@gtlaw.com)  
[jacxsensc@gtlaw.com](mailto:jacxsensc@gtlaw.com)  
[holdene@gtlaw.com](mailto:holdene@gtlaw.com)  
\* Admitted *pro hac vice*

Brian P. Johnson  
State Bar No. 10685700  
Kealy C. Sehic  
State Bar No. 24040688  
JOHNSON, TRENT, WEST, & TAYLOR, LLP  
919 Milam, Suite 1700  
Houston, Texas 77002  
(713) 222-2323 (Telephone)  
(713) 222-2226 (Facsimile)  
[BJohnson@johnsontrent.com](mailto:BJohnson@johnsontrent.com)  
[KSehic@johnsontrent.com](mailto:KSehic@johnsontrent.com)

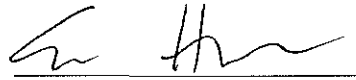
COUNSEL FOR DEFENDANTS 3M COMPANY,  
ARIZANT HEALTHCARE INC., and ROBERT  
PRESTERA

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing has been served on all counsel of record via first class mail on July 23, 2015.

David W. Hodges  
Gabriel Assaad  
Kennedy Hodges, LLP  
711 W. Alabama Street  
Houston, Texas 77006

Kyle Farrar  
Mark Bankston  
Farrar & Ball, LLP  
1010 Lamar Street, Suite 1600  
Houston, Texas 77002

A handwritten signature in black ink, appearing to read 'Evan C. Holden', is written over a horizontal line.

Evan C. Holden

**EXHIBIT "A"**

**DEFINITIONS**

1. "Person" as used in these Requests means all natural persons, corporations, partnerships, trusts, or other associations, and all other entities.
2. "You" and "your" as used in these Requests means Scott Augustine, M.D., his representatives, administrative or personal assistants, agents, legal representatives, and all other persons acting on his behalf or under his direction or supervision.
3. "Tommy Walton" as used in these Requests means Tommy Walton, his representatives, administrative or personal assistants, agents, legal representatives, and all other persons acting on his behalf or under his direction or supervision.
5. "Communication" means and includes any and all direct or indirect transmissions of information by any means, written, oral or otherwise.
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8. "Related to" or "relating to" shall mean directly or indirectly embodying, mentioning or describing, pertaining to, referring to, consisting of, being connected with or reflecting upon a stated subject matter.
9. "The Case" shall mean the lawsuit *Tommy Walton v. 3M Company, Arizant Healthcare Inc., and Robert Prestera*, currently pending in the U.S. District Court for the Southern District of Texas, Docket No. 4:13-cv-1164.

10. “Defendants” shall be deemed to include, but without limitation, Defendants 3M Company and/or Arizant Healthcare Inc., including their predecessor companies, and each of their employees, agents, officers, directors, representatives, consultants, accountants, and attorneys, including any person who served in any such capacity at ANY time.
11. “Augustine Biomedical” shall be deemed to include, but without limitation, Augustine Biomedical & Design, LLC, Augustine Temperature Management LLC, Hot Dog USA, LLC, and Hot Dog International, including their predecessor companies, parent and/or subsidiary companies, and each of their employees, agents, officers, directors, representatives, consultants, accountants, and attorneys, including any person who served in any such capacity at ANY time.
12. “And” means “and/or” and “or” means “and/or.” The plural of any word used herein includes the singular and the singular includes the plural. The masculine gender of any word used here includes the feminine. The past tense of a verb used herein includes the present tense, and the present tense includes the past tense.

### REQUESTS

Unless otherwise specified below, the relevant time period for each Request is the period beginning on January 1, 2005 to the present.

1. Any and all documents, transcripts, medical records, court filings, discovery, or other documents from the lawsuit *Tommy Walton v. 3M Company, Arizant Healthcare Inc., and Robert Prestera*, that you have received or reviewed.
2. Any and all documents constituting, relating or referring to any communications, meetings, interactions, services or payments exchanged, or agreements between (a) You, Augustine Biomedical, or any other person or entity acting on Your behalf; and (b) the law firms Kennedy Hodges, LLP and/or Farrar & Ball, LLP, including but not limited to calendar entries, invoices, emails, letters, documents exchanged, and meeting notes.
3. Any and all communications regarding forced air warming between (a) You, Augustine Biomedical, or any other person or entity acting on Your behalf; and (b) the U.S. Food and Drug Administration (FDA).
4. Any and all communications regarding forced air warming between (a) You, Augustine Biomedical, or any other person or entity acting on Your behalf; and (b) the Office of Inspector General, U.S. Department of Health & Human Services.
5. Any and all communications regarding forced air warming and/or the Defendants between (a) You, Augustine Biomedical, or any other person or entity acting on Your behalf; and (b) the ECRI Institute.
6. Any and all communications regarding forced air warming and/or Dr. Farhad Memarzadeh between (a) You, Augustine Biomedical, or any other person or entity acting on Your behalf; and (b) the National Institutes of Health (NIH).
7. Any and all communications regarding forced air warming and/or the Defendants between (a) You, Augustine Biomedical, or any other person or entity acting on Your

behalf; and (b) the United Kingdom Medicines and Healthcare Products Regulatory (MHRA).

8. Any and all communications regarding forced air warming between (a) You, Augustine Biomedical, or any other person or entity acting on Your behalf; and (b) any newspapers.
9. Any and all communications regarding the article "Forced-air warming does not worsen air quality in laminar flow operating rooms," Sessler DI, Olmsted RN, Kuelpmann R. (Anesth Analg. 2011 Sep 29), between (a) You, Augustine Biomedical, or any other person or entity acting on Your behalf; and (b) any editors, employees, or other persons affiliated with the journal *Anesthesia & Analgesia*.
10. Any and all documents, including correspondence and draft correspondence, related to the MedWatch report referenced in Your July 9, 2010 letter to Kurt Hilzinger, Court Square Capital Partners.
11. Any and all documents, data, photographs, or video relating to the production of any videos posted to <http://heat-rises.blogspot.com> that claim to show disruption of operating room airflow by forced-air warming, including footage taken but not posted online, documentation regarding the test protocols, documentation regarding all aspects of the ventilation system of the operating room and its performance, and documentation regarding the forced air warming blower and blankets used and any adjustments made to the devices.
12. Any and all social media postings, messages, and blog entries, posted by You, Augustine Biomedical, or any other person or entity acting on Your behalf, that reference or relate to forced-air warming or to the lawsuit *Tommy Walton v. 3M Company, Arizant Healthcare Inc., and Robert Prester*, from January 1, 2013 to today.
13. Any and all electronic or paper files and file folders related to the lawsuit *Tommy Walton v. 3M Company, Arizant Healthcare Inc., and Robert Prester*.
14. Any and all documents reviewed by you in preparation for this deposition.
15. Your current and up-to-date resume or Curriculum Vitae.

AO 88A (Rev. 02/14) Subpoena to Testify at a Deposition in a Civil Action

## UNITED STATES DISTRICT COURT

for the

Southern District of Texas

TOMMY WALTON

*Plaintiff*

v.

3M COMPANY, ARIZANT HEALTHCARE, INC., and  
ROBERT PRESTERA*Defendant*

Civil Action No. 4:13-cv-1164

## SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To:

Scott Augustine, M.D.

*(Name of person to whom this subpoena is directed)*

☒ **Testimony:** **YOU ARE COMMANDED** to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

Place: Blackwell Burke P.A.  
431 South Seventh Street, Suite 2500  
Minneapolis, MN 55415

Date and Time:

10/15/2015 9:00 am

The deposition will be recorded by this method: Audio & Video

☒ **Production:** You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and must permit inspection, copying, testing, or sampling of the material: See attached Exhibit "A"

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date:

7/23/15

CLERK OF COURT

OR

*Signature of Clerk or Deputy Clerk**Attorney's signature*

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* 3M COMPANY, ARIZANT HEALTHCARE, INC., and ROBERT PRESTERA, who issues or requests this subpoena, are:

Evan C. Holden, Greenberg Traurig, 3333 Piedmont Road NE, Atlanta, GA 30305, holdene@gtlaw.com, (678) 553-7320

**Notice to the person who issues or requests this subpoena**

If this subpoena commands the production of documents, electronically stored information, or tangible things before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

AO 88A (Rev. 02/14) Subpoena to Testify at a Deposition in a Civil Action (Page 2)

Civil Action No. 4:13-cv-1164

**PROOF OF SERVICE***(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)*

I received this subpoena for *(name of individual and title, if any)* \_\_\_\_\_  
 on *(date)* \_\_\_\_\_.

☐ I served the subpoena by delivering a copy to the named individual as follows: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_ on *(date)* \_\_\_\_\_; or

☐ I returned the subpoena unexecuted because: \_\_\_\_\_  
 \_\_\_\_\_.

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also  
 tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of  
 \$ \_\_\_\_\_.

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ 0.00 .

I declare under penalty of perjury that this information is true.

Date: \_\_\_\_\_  
 \_\_\_\_\_  
*Server's signature*

\_\_\_\_\_  
*Printed name and title*

\_\_\_\_\_  
*Server's address*

Additional information regarding attempted service, etc.:



**Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)****(c) Place of Compliance.**

**(1) For a Trial, Hearing, or Deposition.** A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

- (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
- (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
  - (i) is a party or a party's officer; or
  - (ii) is commanded to attend a trial and would not incur substantial expense.

**(2) For Other Discovery.** A subpoena may command:

- (A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and
- (B) inspection of premises at the premises to be inspected.

**(d) Protecting a Person Subject to a Subpoena; Enforcement.**

**(1) Avoiding Undue Burden or Expense; Sanctions.** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

**(2) Command to Produce Materials or Permit Inspection.**

**(A) Appearance Not Required.** A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

**(B) Objections.** A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

- (i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.
- (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

**(3) Quashing or Modifying a Subpoena.**

**(A) When Required.** On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
- (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden.

**(B) When Permitted.** To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

**(C) Specifying Conditions as an Alternative.** In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

**(e) Duties in Responding to a Subpoena.**

**(1) Producing Documents or Electronically Stored Information.** These procedures apply to producing documents or electronically stored information:

**(A) Documents.** A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

**(B) Form for Producing Electronically Stored Information Not Specified.** If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

**(C) Electronically Stored Information Produced in Only One Form.** The person responding need not produce the same electronically stored information in more than one form.

**(D) Inaccessible Electronically Stored Information.** The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

**(2) Claiming Privilege or Protection.**

**(A) Information Withheld.** A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

- (i) expressly make the claim; and
- (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

**(B) Information Produced.** If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

**(g) Contempt.**

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

# Exhibit N

15AC64  
DHR/BRTUNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

TOMMY WALTON,

Civil Action No. 4:13-cv-01164

Plaintiff,

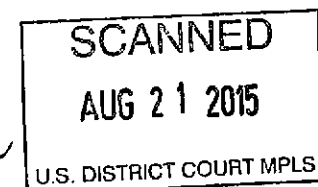
v.

3M COMPANY; ARIZANT  
HEALTHCARE, INC.; AND  
ROBERT PRESTERA**DEFENDANTS' MOTION TO  
COMPEL THIRD PARTIES DR.  
SCOTT AUGUSTINE, AUGUSTINE  
BIOMEDICAL + DESIGN,  
AUGUSTINE TEMPERATURE  
MANAGEMENT, HOT DOG USA,  
AND AUGUSTINE TEAM, LLC TO  
PRODUCE DOCUMENTS IN  
RESPONSE TO SUBPOENAS**

Defendants.

**I. INTRODUCTION**

3M Company ("3M") and Arizant Healthcare Inc. ("Arizant") (collectively, "Defendants"), through their undersigned counsel, respectfully move pursuant to Fed. R. Civ. P. 37(a)(3)(B)(i) for an order compelling the production of documents and a privilege log in response to Defendants' subpoenas sent to key third party witness Dr. Scott Augustine ("Dr. Augustine"), and his companies, Augustine Biomedical + Design, Augustine Temperature Management, Hot Dog USA, and Augustine Team, LLC (collectively, the "Augustine Companies"), in connection with a personal injury products liability action in the United States District Court for the Southern District of Texas, *Tommy Walton v. 3M Company; Arizant Healthcare Inc.; and Robert Prestera*, No. 4:13-cv-01164 (S.D. Tex.) ("*Walton*"). As detailed below, Defendants have properly subpoenaed Dr. Augustine, and the Augustine companies, as Dr. Augustine is a citizen of the State of Minnesota, and the Augustine Companies are headquartered in Minnesota.



Thus, this matter is properly before this Court. In support of this Motion, Defendants state as follows:

## **II. BACKGROUND**

In *Walton*, Plaintiff Tommy Walton (“Plaintiff”) alleges claims for strict liability (defects in design, manufacture, and warnings), negligence, and fraud relating to an FDA-cleared medical device known as the Bair Hugger Forced Air Warming unit (“Bair Hugger FAW”), manufactured and distributed by Defendants. The Bair Hugger FAW is used to warm patients before and during surgery, in order to maintain a patient’s normal body temperature. Maintaining normal body temperature, or normothermia, is clinically proven to help reduce the risk of infections and improve surgical outcomes. Since its inception in 1987, the Bair Hugger FAW has safely warmed more than 200 million surgical patients in hospitals around the world. It is used in more than 80 percent of U.S. hospitals. The technology is supported by more than 170 clinical studies, including 60 randomized controlled trials. Few medical devices have been as well-studied and successfully employed in real-world operating rooms as the Bair Hugger FAW. Nonetheless, Plaintiff asserts the Bair Hugger FAW used in his orthopedic surgery caused his infection. Defendants deny these allegations. Post-operative infections of the type Plaintiff alleges are well-known complications of any surgery, especially those related to orthopedic implants, which tend to be more extensive and lengthier. Such post-operative infections are known to be caused by patient factors, physician factors, and environmental factors including hospital-based infections, and indeed are more likely to occur in the absence of any warming device maintaining normal body temperature

The reason Plaintiff blames his infection on the Bair Hugger FAW is because one of Defendants' current competitors in the patient warming industry has been engaged in a fear-mongering campaign against the Bair Hugger FAW device in an effort to jump-start the sales of its competing product. *See* Affidavit of Mark Scott at 8-12, filed in *Walton v. 3M*, attached as Exhibit "A." The Chief Executive Officer of this competitor, Dr. Augustine of Augustine Biomedical & Design, was the original inventor and developer of the Bair Hugger FAW device. *Id.* at 8. Yet, Dr. Augustine has since developed a new patient warming device with a different design. *Id.* at 9. His new device (the "HotDog") works much like an electric blanket by providing warmth to the patient through direct contact between the patient and the device, as opposed to the Bair Hugger's forced air method of warming. *Id.* In a misguided attempt to drive sales of the HotDog, beginning in 2009, Dr. Augustine and the Augustine Companies have launched a misinformation campaign falsely claiming that the use of forced air warming may increase airborne contamination in operating rooms. The misinformation campaign is driven by ulterior motives and Augustine-sponsored junk science, and is contradicted by decades of research and clinical experience. Now, in cases like this one, it has spilled over into the courts.

Dr. Augustine and the Augustine Companies clearly have a vested interest in the litigation against Defendants. They have used the filing of various lawsuits, and even the affirmative defenses pled by defendants, in marketing materials and on their company website in an effort to convince potential customers that the Bair Hugger is unsafe or could lead to liability. Dr. Augustine cites *Walton* in communications to 3M's customers

in an effort to create concern about the Bair Hugger FAW. *See*, e.g., April 23, 2013 e-mail from Stop Surgical Infections<sup>1</sup> to Sharon R. Brandt, R.N., CNRA, a copy of which is attached as Exhibit “B.” In his communications, Dr. Augustine includes information entitled “Litigation News” in which he attempts to describe the proceedings in *Walton*. *Id.* at pp. 2-3. Defendants anticipate that Dr. Augustine and the Augustine Companies will continue their campaign throughout the proceedings in *Walton* and the other litigation against Defendants and the Bair Hugger FAW.

Dr. Augustine is also expected to be an important witness in this case. As the leading critic of the Bair Hugger FAW, the driving force behind the misinformation campaign directed against the Bair Hugger FAW, and the sponsor (through his companies) of most of the literature attacking the Bair Hugger FAW, Dr. Augustine is all but certain to offer key testimony in this case regarding liability and causation. Indeed, in *Walton*, Plaintiff has served supplemental interrogatory responses in May 2015, a copy of which is attached as Exhibit “C”, stating that Dr. Augustine is expected to testify about his supposed concerns about the safety of the Bair Hugger FAW and his efforts to inform Defendants of supposed risks associated with the device. Communications and agreements between Plaintiff’s counsel, Dr. Augustine, and the Augustine Companies are thus directly relevant, because they could show that Dr. Augustine was motivated by competitive interests and not by any legitimate safety concerns.

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<sup>1</sup> Stop Surgical Infections is underwritten by Augustine Temperature Management. *See* [www.stopsurgicalinfections.org](http://www.stopsurgicalinfections.org).

Defendants served a subpoena on Dr. Augustine on April 6, 2015, noticing his deposition for May 6, 2015 and including document requests (the “Subpoena Requests”). See Subpoena Requests to Dr. Augustine, attached hereto as Exhibit “D.” The Subpoena Requests seek documents directly and unquestionably relevant to the allegations in *Walton*, including: “Any and all documents, transcripts, medical records, court filings, discovery, or other documents from the lawsuit *Tommy Walton v. 3M Company, Arizant Healthcare Inc., and Robert Prestera*, that you have received or reviewed;” “Any and all communications regarding forced air warming between [Dr. Augustine] ...and the U.S. Food and Drug Administration;” “Any and all communications regarding forced air warming between [Augustine]...and any newspapers.”

On April 15, 2015, Dr. Augustine’s attorney served boilerplate objections to the Subpoena Requests. With regard to those requests seeking communications between Dr. Augustine and Plaintiff’s attorneys, Dr. Augustine’s counsel further objected on the grounds that, “To the extent such documents, if any, exist, they would be protected from disclosure by attorney-client privilege and as attorney work product.” See April 15, 2015 letter from Randy Benham, counsel for Dr. Augustine, to Evan Holden (“E. Holden”), counsel for Defendants, a copy of which is attached as Exhibit “E.”

On April 24, 2015, Defendants responded to Dr. Augustine’s counsel regarding Plaintiff’s improper objections and demanded a privilege log. See Exhibit “F,” April 24, 2015 e-mail from E. Holden to R. Benham. On April 28, 2015, Defendants issued subpoenas to the Augustine Companies, again including Subpoena Requests seeking documents from these entities. Like the very similar Subpoena Requests on Dr.

Augustine, the requests to the Augustine Companies seek documents directly and unquestionably relevant to the allegations in *Walton*. See Subpoena Requests sent to Augustine Companies, attached hereto as Exhibit “G.” On May 11, 2015, Dr. Augustine’s counsel responded to Defendants’ subpoenas by once again asserting boilerplate objections and objections on attorney-client privilege grounds. See Exhibit “H.”

It is undisputed that Dr. Augustine has been in communication with Plaintiff’s counsel, Kennedy Hodges LLP, from the very onset of the *Walton* litigation. Defendants issued discovery upon Plaintiff seeking these communications between Plaintiff’s counsel and Dr. Augustine. Plaintiff’s counsel initially argued that these communications were privileged, as Dr. Augustine was a potential testifying or consulting expert. Yet on January 8, 2015, Plaintiff withdrew Dr. Augustine as a consulting expert. See January 8, 2015 e-mail from Gabriel Assaad, Plaintiff’s counsel, to Evan Holden, Defendants’ counsel, a copy of which is attached as Exhibit “I.” Defendants subsequently filed a Motion to Compel against Plaintiff in the *Walton* case, seeking these communications between Dr. Augustine and Plaintiff’s counsel. In his response to Defendants’ Motion to Compel, Plaintiff’s counsel argued that communications between Kennedy Hodges and Dr. Augustine were protected from disclosure by the attorney-client privilege because Dr. Augustine had retained Kennedy Hodges as his attorney to represent him in connection with potential commercial litigation between Dr. Augustine and Arizant/3M in July, 2009. See Affidavit of David Hodges, filed in *Walton v. 3M*, attached as Exhibit “J.”



On May 19, 2015, the *Walton* court denied Defendants' Motion to Compel, but held that Defendants "may, of course, seek discovery directly from Dr. Augustine, who has been identified by Plaintiff as a fact witness, through a deposition and/or a subpoena. *See* Exhibit "K" (May 19, 2015 Order in *Walton v. 3M*). The Walton Court did not rule on the production of a privilege log, the retainer agreement, or non-privileged documents. Defendants are moving to compel these documents from Plaintiff and Plaintiff's counsel in the Walton case.

Defendants have engaged in continuous attempts to meet and confer with counsel for Dr. Augustine and the Augustine Companies, Randy Benham. Defendants' counsel has repeatedly contacted Mr. Benham regarding the long overdue documents from Dr. Augustine and the Augustine Companies, which are responsive to the subpoenas, and demanded a privilege log for any documents that are allegedly privileged. *See* Group Exhibit "L" July 23, 2015 e-mail from Lori Cohen, Defendants' counsel to Randy Benham, Dr. Augustine's counsel; July 28, 2015 e-mail from Evan Holden, Defendants' counsel to Randy Benham, Dr. Augustine's counsel; August 11, 2015 e-mail from Evan Holden to Randy Benham. Rather than setting aside thirty minutes at any time in the last month to meet and confer with Defendants' counsel, Dr. Augustine's counsel has instead repeatedly promised, delayed, and postponed the requested meet and confer for weeks.

Finally, on August 17, 2015—four months after Defendants served the Subpoena Requests—Dr. Augustine's counsel finally sent an email to Defendants' counsel in which he belatedly agreed to produce certain categories of documents and to search for others, without explaining why the search had not already occurred in the preceding four months.

Dr. Augustine's counsel did not offer a date certain on which the production would occur, stating only that it would take "a couple of weeks." Dr. Augustine's counsel continued to assert attorney-client privilege objections with regard to communications with Plaintiff's counsel, but did not agree to provide a privilege log, as Defendants' counsel had repeatedly requested. And Dr. Augustine's counsel raised new objections to a handful of requests, again without explaining why these objections had not been forthcoming in the preceding four months. Lastly, Dr. Augustine's counsel expressed his view that this email would stand in lieu of the meet and confer requested by Defendants' counsel. A copy of the August 17, 2015 email from Dr. Augustine's counsel is attached hereto as Exhibit "M."

Defendants' counsel promptly responded by email on August 18, 2015, asking for Dr. Augustine's commitment by the end of the day to a date certain (Defendants proposed August 25, 2015) for the production of documents by Dr. Augustine and his companies, and requesting confirmation by the end of the day that Dr. Augustine and his companies would provide a privilege log. *See* Exhibit "N." Dr. Augustine's counsel did not respond, and still has not responded.

Dr. Augustine's depositions are set by properly issued subpoenas for October 13, 2015 and October 15, 2015, and cannot be moved from these dates in light of the difficulties scheduling the deposition and the Court's pending scheduling order, under which discovery closes on November 30, 2015. Thus, it is urgent that Dr. Augustine and the Augustine Companies produce the responsive documents in advance of Dr. Augustine's deposition.

### III. ARGUMENT

Discovery under the Federal Rules of Civil Procedure is permissive, authorizing parties to obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party. *See* Fed. R. Civ. P. 26 (b)(1). A non-party served with a subpoena is subject to the same scope of discovery as a party. *See* Fed. R. Civ. P. 45(d)(1), Advisory Comm. Note (1991 amendment) (stating that the scope of discovery through a subpoena is the same as that applicable to Rule 34). Motions to compel non-party production based on a Rule 45 subpoena are subject to the standards of Rule 26. *See Shukh v. Seagate Tech., LLC*, 295 F.R.D. 228, 236 (D. Minn. 2013) (stating that “subpoenas issued under Rule 45 are subject to the same ‘constraints that apply to all of the other methods of formal discovery’”) (quoting *Marvin Lumber & Cedar Co. v. PPG Indus., Inc.*, 177 F.R.D. 443, 443 (D. Minn. 1997)). “[A]n evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer or respond.” Fed. R. Civ. P. 37(a)(4).

Dr. Augustine and the Augustine Companies have failed to respond at all to Defendants’ Subpoena Requests, and their counsel has not been cooperative in working with Defendants’ counsel to supplement their responses as requested and required. The documents requested in Defendants’ Subpoena Requests are highly relevant to the litigation against Defendants in *Walton*, and it is crucial that Defendants obtain these documents prior to Dr. Augustine’s deposition. The objections of Dr. Augustine and the Augustine Companies to Defendants’ requests are mere boilerplate, and their assertions of privilege have no basis and are improper. Dr. Augustine and the Augustine Companies

should be compelled to produce the responsive documents immediately, and in all events at least a month prior to Dr. Augustine's deposition on October 13, 2015 and October 15, 2015.

**A. The Court Should Order Dr. Augustine and the Augustine Companies to Produce All Non-Privileged Documents Responsive to Defendants' Subpoena Requests.**

Dr. Augustine and the Augustine Companies have offered no basis whatsoever to withhold non-privileged documents responsive to Defendants' Subpoena Requests, and should be compelled to produce them promptly. In response to the subpoenas served upon Dr. Augustine and the Augustine Companies, Dr. Augustine's counsel transmitted letters containing nothing more than boilerplate objections to Defendants' Subpoena Requests (as well as baseless assertions of attorney-client privilege, discussed in § II.B, *infra*), unaccompanied by any responsive documents or any indication that such documents would be forthcoming. Under Fed. R. Civ. P. 45(c)(2)(B), where a recipient of a subpoena responds only with objections, a serving party may move the issuing court for an order compelling production of the requested documents. Defendants have repeatedly attempted to meet and confer with counsel for Dr. Augustine and the Augustine Companies, and have requested on numerous occasions that Dr. Augustine and the Augustine Companies better explain the basis for their objections. *See, e.g.*, Exhibit "F," April 24, 2015 e-mail from Evan. Holden, Defendants' counsel, to Randy Benham, Dr. Augustine's counsel. Yet counsel has failed and refused to meet and confer, instead repeatedly proclaiming his unavailability, promising to schedule a meet and confer, failing to do so, and then repeating the cycle when confronted with his failure to

cooperate. *See, e.g.* Group Exhibit “O,” July 29 e-mail from Randy Benham, Dr. Augustine’s counsel to Evan Holden and Lori Cohen, Defendants’ counsel; August 1, 2015 e-mail from Randy Benham, Dr. Augustine’s counsel to Evan Holden, Defendants’ counsel; August 12, 2015 e-mail from Randy Benham, Dr. Augustine’s counsel to Evan Holden, Defendants’ counsel.

The belated email from Dr. Augustine’s counsel on August 17, 2015, offered in lieu of a meet and confer, does not resolve this issue. Though Dr. Augustine and the Augustine Companies now concede that they must produce certain categories of documents sought in the Subpoena Requests, the August 17 email reveals that they have not even begun to search for the requested documents, does not set a date certain for the production of non-privileged documents, belatedly offers new objections to several Subpoena Requests—including one seeking emails regarding forced-air warming, the key issue in the *Walton* litigation—and yet again declines Defendants’ request to meet and confer. In light of the contumacious history of Dr. Augustine and the Augustine Companies in failing and refusing to respond to the Subpoena Requests, and further refusing to meet and confer, for more than four months, this email can only be seen as another tactical gambit to further delay the production and to evade certain of the Subpoena Requests indefinitely. With Dr. Augustine’s deposition rapidly approaching, these delay tactics should no longer be countenanced.

Defendants’ Subpoena Requests are reasonably calculated to seek documents in the possession of Dr. Augustine and the Augustine Companies which relate to Plaintiff’s claims against Defendants in *Walton*. Dr. Augustine and the Augustine Companies have

failed to show that any of Defendants' requests are "not relevant," "overly broad, vague and ambiguous," or "unreasonable and oppressive," as their counsel states in his objections to Defendants' Subpoena Requests. *See* April 15, 2015 letter from Randy Benham, Dr. Augustine's counsel to Evan Holden, Defendants' counsel, attached as Exhibit "E;" May 11, 2015 e-mail from Randy Benham, Dr. Augustine's counsel to Evan Holden, Defendants' counsel, attached as Exhibit "H." These form objections, unaccompanied by any explanation, are invalid. Indeed, the August 17 email concedes as much, dropping these objections as to most of the Subpoena Requests even while failing to produce responsive documents or to set a date certain to do so, and continuing to refuse production of certain categories of relevant, non-privileged documents. The Court has previously cautioned that "routine boilerplate responses" are "inappropriate." *Lubrication Technologies, Inc. v. Lee's Oil Serv., LLC*, No. CIV. 11-2226 DSD/LIB, 2012 WL 1633259, at \*5 (D. Minn. Apr. 10, 2012). "Boilerplate objections, without more specific explanations for any refusal to provide information, are not consistent with the Federal Rules of Civil Procedure." *Id.* "To the extent that the Defendants object to a discovery request, they cannot rely upon boilerplate objections, but rather they must specify how each interrogatory or request for production is deficient and articulate the particular harm that would accrue if they were required to respond to the discovery request." *Id.* Dr. Augustine and the Augustine Companies have not done so.

Dr. Augustine and the Augustine Companies have been afforded every opportunity to explain, to the extent they can, whatever grounds they assert to withhold non-privileged documents from production. They have not done so, and their counsel has

dodged all efforts to meet and confer, evidently hoping to kick the can down the road far enough that Dr. Augustine's deposition will come and go before Dr. Augustine and the Augustine Companies respond to the Subpoena Requests. The August 17 email, far from resolving this pattern of delay, merely perpetuates it. To this day, Dr. Augustine and the Augustine Companies have provided no date certain by which they intend to comply with Defendants' Subpoena Requests, and their counsel still declines to confer with Defendants regarding this issue. Defendants have gone above and beyond the call of diligence and good faith in their efforts to satisfy the meet and confer requirements of Rule 37(a)(1) and Local Rule 7.1. This issue is ripe for resolution by this Court, and the outcome is clear. For the reasons set forth above, Defendants respectfully request that the Court compel Dr. Augustine and the Augustine Companies to produce immediately, and in all events no later than September 1, 2015 (a date that should pose no burden for Dr. Augustine's counsel, as he represented in his August 17 email that he could assemble the responsive documents in "a couple of weeks"), all non-privileged documents within their possession, custody or control which are responsive to Defendants' Subpoena Requests.

**B. The Court Should Order Dr. Augustine and the Augustine Companies to Produce a Privilege Log**

In addition to producing all non-privilege documents, Defendants also request that the Court order Dr. Augustine and the Augustine Companies to produce a privilege log detailing any documents responsive to Defendants' subpoenas which Dr. Augustine and the Augustine Companies are withholding based on an assertion of privilege. Dr. Augustine and the Augustine Companies are required to produce such a log. *See Fed. R.*

Civ. P. 45(e)(2)(A) (“A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must: (i) expressly make the claim; and (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.”).

Dr. Augustine and the Augustine Companies object to producing unspecified documents responsive to Defendants’ Subpoena Requests, and in particular those requests pertaining to communications between Dr. Augustine or his companies and Plaintiff’s counsel, on the grounds that the unidentified documents are protected by the attorney-client privilege. *See* April 15, 2015 letter from Randy Benham, Dr. Augustine’s counsel, to Evan Holden, Defendants’ counsel, attached as Exhibit “E;” May 11, 2015 e-mail from Randy Benham, Dr. Augustine’s counsel, to Evan Holden, Defendants’ counsel, attached as Exhibit “H.” Yet, Dr. Augustine and the Augustine Companies fail to describe the nature of the withheld documents and communications. On multiple occasions, Defendants have requested a privilege log that would describe these details. *See* April 24, 2015 e-mail from Evan Holden, Defendants’ counsel, to Randy Benham, Dr. Augustine’s counsel, attached hereto as Exhibit “F;” July 23, 2014 e-mail from Lori Cohen, Defendants’ counsel to Randy Benham, Dr. Augustine’s counsel, attached hereto as Exhibit “L.” To date, Dr. Augustine and the Augustine Defendants have never produced such a privilege log, even though Defendants’ subpoenas were served more than four months ago. The August 17 email, too, is silent on this issue.



The production of a privilege log is essential to evaluate the assertion of privilege made by Dr. Augustine and the Augustine Companies. Attorney-client privilege does not indiscriminately protect all communications between Dr. Augustine, the Augustine Companies, and Plaintiff's counsel. Based on Plaintiff's response to Defendants' motion to compel in *Walton*, the asserted attorney-client relationship between Dr. Augustine and Plaintiff's counsel pertains to Dr. Augustine's purported retention of one of Plaintiff's law firms, Kennedy Hodges, as his attorney in connection with representing Dr. Augustine in connection with potential commercial litigation against Defendants in July 2009.<sup>2</sup> Consequently, even if this retention could be demonstrated, the assertion of attorney-client privilege would be limited solely to the scope of the representation, and not subsequent communications between Dr. Augustine, the Augustine Companies, and Plaintiff's counsel regarding Bair Hugger product liability personal injury litigation, such as *Walton*. It further would not cover any communications prior to the entry of the retainer agreement in July 2009.

The essential elements of attorney-client privilege in Minnesota are: "(1) where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications *relating to that purpose*, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or the legal advisor, (8) except the privilege may be waived." *PETCO Animal Supplies Stores*,

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<sup>2</sup> Plaintiff's counsel has not yet produced the retainer agreement despite Defendants' multiple requests. Defendants are moving to compel the production of the retainer agreement in the *Walton* case. To the extent that Dr. Augustine is also in possession of the retainer agreement, Defendants request that the Court compel Dr. Augustine to produce that document as well.

*Inc. v. Ins. Co. of N. Am.*, No. CIV. 10-682 SRN/JSM, 2011 WL 2490298, at \*9 (D. Minn. June 10, 2011) (emphasis added) (citing Minn. Stat. § 595.02(b); *Kobluk v. University of Minn.*, 574 N.W.2d 436, 440 (Minn.1998)). To the extent Dr. Augustine or the Augustine Companies engaged in communications with Plaintiff's counsel regarding the Bair Hugger product liability litigation, such as the *Walton* case, commenced years after Dr. Augustine's purported retention of Kennedy Hodges in July 2009 regarding potential commercial litigation that never came to pass, such communications are outside the scope of the alleged representation, and are unrelated to its purpose. Attorney-client privilege also would not extend to communications between Dr. Augustine and Plaintiff's counsel prior to the entry of the retainer agreement and communications between Dr. Augustine and those law firms other than Kennedy Hodges involved in Plaintiff's representation. Only a privilege log setting forth the communications Dr. Augustine and the Augustine Companies seek to shield from disclosure, the dates of those communications, the senders and recipients of the communications, and the subject matter of the communications (in sufficient detail to determine whether they related to the purported 2009 "potential litigation," to the *Walton* case, or to some other matter), will enable the parties and the Court to determine which communications might be withheld and which must be produced.

Until Dr. Augustine and the Augustine Companies produce a privilege log for the communications they allege are privileged, it is impossible for Defendants to evaluate their claim of privilege and to determine whether the communications are protected by the attorney-client privilege. Accordingly, the Court should order Augustine to produce a

privilege log immediately, and in all events no later than August 31, 2015, so that Defendants can promptly evaluate the assertion of privilege and, if necessary, seek relief from the Court with respect to non-privileged communications for which a claim of privilege has been improperly asserted.

**C. The Court Should Award Defendants Their Costs and Attorneys' Fees**

If the Court grants Defendants' motion to compel, then the Federal Rules of Civil Procedure provide for an award of reasonable expenses and attorney's fees to the successful party, except in the following limited circumstances: (i) the successful party did not confer in good faith before the motion; (ii) the opposing party's position was substantially justified; or (iii) other circumstances would make an award unjust. Fed. R. Civ. P. 37(a)(5)(A). Because none of these limited exceptions apply here, and because the behavior of Dr. Augustine and the Augustine Companies in failing to comply with Defendants' Subpoena Requests has been egregious, the Court should require that Dr. Augustine and the Augustine Companies pay Defendants their costs and reasonable attorney's fees in bringing this motion to compel.

First, Defendants satisfied their meet and confer obligations under Rule 37(a)(1) and Local Rule 7.1. Indeed, as detailed above, Defendants' counsel acted in good faith by contacting counsel for Dr. Augustine and the Augustine Companies on numerous occasions in an attempt to resolve the discovery disputes described above, only to be met with a wall of avoidance and indifference preventing every effort to resolve this matter.

Second, the failure of Dr. Augustine and the Augustine Companies to respond appropriately and adequately to Defendants' Subpoena Requests was not substantially

justified. Defendants' Subpoena Requests are clearly relevant to the claims against Defendants in *Walton*. As explained above, rather than meet their discovery obligations, Dr. Augustine and the Augustine Companies have chosen instead to withhold clearly discoverable information. The end result is the unreasonable obstruction of Defendant's efforts to take full and fair discovery.

Third, there are no other circumstances that would make it unjust to award costs and fees to Defendants. On the contrary, Defendants have attempted to obtain complete and accurate responses to their subpoenas and have worked in good faith to try to address the unfounded objections asserted by Dr. Augustine and the Augustine Companies, all at considerable time and expense to Defendants, ultimately necessitating this motion. Accordingly, there are no circumstances that would make an award of expenses unjust.

#### IV. CONCLUSION

For the reasons set forth above, Defendants 3M Company and Arizant Healthcare, Inc. respectfully request the Court enter an order (a) compelling Dr. Augustine and the Augustine Companies to produce all non-privileged documents responsive to Defendants' Subpoena Requests; (b) compelling Dr. Augustine and the Augustine Companies to produce a privilege log for any documents withheld from production on grounds of attorney-client privilege, setting forth the communications Dr. Augustine and the Augustine Companies seek to shield from disclosure, the dates of those communications, the senders and recipients of the communications, and the subject matter of the communications in sufficient detail to determine the basis for the assertion of privilege; (c) granting an award of costs and reasonable attorneys' fees to Defendants

for expenses incurred in connection with bringing this Motion; and (d) granting all other relief that the Court deems just and proper.

Respectfully submitted this 21<sup>st</sup> day of August, 2015.

**FAEGRE BAKER DANIELS LLP**

/s/Bridget M. Ahmann

Bridget M. Ahmann  
(MN Atty ID No. 016611X)  
2200 Wells Fargo Center  
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Minneapolis, Minnesota 55402  
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Lori G. Cohen (Ga. Bar No. 174455)  
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GREENBERG TRAURIG LLP  
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(678) 553-2100 (telephone)  
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cohenl@gtlaw.com

**CERTIFICATE OF SERVICE**

I hereby certify that on August 21, 2015, I caused the foregoing Defendants' Motion to Compel Third Parties Dr. Scott Augustine, Augustine Biomedical + Design, Augustine Temperature Management, Hot Dog USA, and Augustine Team, LLC to Produce Documents in Response to Subpoenas, to be served on the following parties via United States Mail, postage prepaid:

David W. Hodges  
Gabriel Assaad  
Kennedy Hodges, LLP  
711 W. Alabama Street  
Houston, Texas 77006

Kyle Farrar  
Mark Bankston  
Farrar & Ball, LLP  
1010 Lamar Street, Suite 1600  
Houston, Texas 77002

J. Randall Benham  
General Counsel  
Augustine Biomedical + Design LLC  
6581 City West Parkway  
Eden Prairie, MN 55344

**FAEGRE BAKER DANIELS LLP**

/s/Bridget M. Ahmann

Bridget M. Ahmann  
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cohenl@gtlaw.com

JS 44 (Rev. 12/12)

## CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

## I. (a) PLAINTIFFS

Tommy Walton

## DEFENDANTS

3M Company; Arizant Healthcare Inc.; and Robert Prestera

## (b) County of Residence of First Listed Plaintiff

(EXCEPT IN U.S. PLAINTIFF CASES)

## County of Residence of First Listed Defendant

(IN U.S. PLAINTIFF CASES ONLY)

NOTE:

IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

## (c) Attorneys (Firm Name, Address, and Telephone Number)

David W. Hodges  
Gabriel Assaad  
Kennedy Hodges, LLP  
711 W. Alabama Street  
Houston, Texas 77006

## Attorneys (If Known)

Bridget M. Ahmann  
(MN Arty ID No. 016611X)  
2200 Wells Fargo Center  
90 South Seventh Street  
Minneapolis, Minnesota 55402

## II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff  
☐ 2 U.S. Government Defendant  
☐ 3 Federal Question (U.S. Government Not a Party)  
☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

## III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- (For Diversity Cases Only)
- |   |   |   |   |
|---|---|---|---|
| Citizen of This State                   | PTF <input type="checkbox"/> 1 DEF <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State     | PTF <input type="checkbox"/> 4 DEF <input type="checkbox"/> 4 |
| Citizen of Another State                | <input type="checkbox"/> 2 <input type="checkbox"/> 2         | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 <input type="checkbox"/> 5         |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 <input type="checkbox"/> 3         | Foreign Nation  | <input type="checkbox"/> 6 <input type="checkbox"/> 6         |

## IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	<input checked="" type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <b>PERSONAL PROPERTY</b> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other <b>LABOR</b> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act <b>IMMIGRATION</b> <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark <b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
<b>REAL PROPERTY</b> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<b>CIVIL RIGHTS</b> <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities Employment <input type="checkbox"/> 446 Amer. w/Disabilities Other <input type="checkbox"/> 448 Education	<b>PRISONER PETITIONS</b> <b>Habeas Corpus:</b> <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <b>Other:</b> <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

## V. ORIGIN (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District (specify) ☐ 6 Multidistrict Litigation

## VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

Brief description of cause:

## VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☐ Yes ☐ No

## VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT #

AMOUNT

APPLYING IFP

JUDGE

MAG. JUDGE

SCANNED

AUG 21 2015

U.S. DISTRICT COURT MPLS

FaegreBD.com

USA • UK • CHINA

FAEGRE BAKER  
RECEIVED  
DANIELS

15 AUG 21 AM 11:31

CLE-08-031  
MINNEAPOLIS

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Faegre Baker Daniels LLP  
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August 20, 2015

Clerk of Court  
United States District Court  
202 U.S. Courthouse  
300 South Fourth Street  
Minneapolis, MN 55415

HAND DELIVERED

Re: *Walton v. 3M, et al.*  
TX Court File No. 4-13-cv-01164

15mcb4  
RHCBRT

Dear Sir or Madam:

Pursuant to your instructions, enclosed for filing in the above-referenced matter are the following documents:

1. Civil Coversheet;
2. Defendants' Notice of Motion to Compel Third Parties Dr. Scott Augustine, Augustine Biomedical + Design, Augustine Temperature Management, Hot Dog USA, and Augustine Team, LLC to Produce Documents in Response to Subpoenas;
3. Defendants' Motion to Compel Third Parties Dr. Scott Augustine, Augustine Biomedical + Design, Augustine Temperature Management, Hot Dog USA, and Augustine Team, LLC to Produce Documents in Response to Subpoenas;
4. Exhibit Index to Defendants' Motion to Compel Third Parties Dr. Scott Augustine, Augustine Biomedical + Design, Augustine Temperature Management, Hot Dog USA, and Augustine Team, LLC to Produce Documents in Response to Subpoenas (with Exhibits A - 0); and
5. Affidavit of Evan C. Holden in Support of Defendants' Motion to Compel Third Parties Dr. Scott Augustine, Augustine Biomedical + Design, Augustine Temperature

SCANNED

AUG 21 2015

U.S. DISTRICT COURT MPLS



Clerk of Court

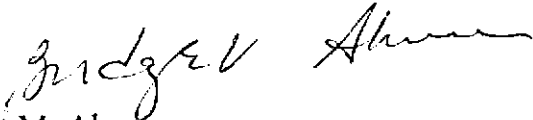
Page 2

August 21, 2015

Management, Hot Dog USA, and Augustine Team, LLC to Produce Documents in Response to Subpoenas (with Exhibits A – 0).

A check in the amount of \$46 for the applicable filing fee is also enclosed. By copy of this letter, counsel are being served with copies of the same. Please do not hesitate to contact me if you have any questions.

Very truly yours,



Bridget M. Ahmann

BMA:djb

Enclosures

cc: David W. Hodges (w/encl. by U.S. mail)  
Kyle Farrar (w/encl. by U.S. mail)  
J. Randall Benham (w/encl by U.S. mail)  
Lori G. Cohen (w/o encl. by email)

# Exhibit O

## UNITED STATES DISTRICT COURT

## DISTRICT OF MINNESOTA

-----  
)  
Timothy Johnson, ) Case No. 15-mc-65 (JNE/FLN)  
)  
Plaintiff, )  
)  
vs. ) Minneapolis, Minnesota  
) October 26, 2015  
) 9:21 a.m.  
3M Company; and )  
Arizant Healthcare, Inc., )  
)  
Defendants. )  
-----

BEFORE **THE HONORABLE FRANKLIN L. NOEL**  
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

**HEARING ON MOTION TO COMPEL AND  
MOTION FOR A PROTECTIVE ORDER**

**APPEARANCES:**

**For the Plaintiffs:**

Levin-Papantonio, P.A.  
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Meshbesh & Spence  
GENEVIEVE M. ZIMMERMAN, ESQ.  
1616 Park Avenue  
Minneapolis, Minnesota 55404

**DIGITAL RECORDING TRANSCRIBED BY:**

Official Court Reporter: JEANNE M. ANDERSON, RMR-RPR  
Suite 146 U.S. Courthouse  
316 North Robert Street  
St. Paul, Minnesota 55101

**APPEARANCES (Continued):**

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431 South 7th Street, Suite 2500  
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For the Petitioner 3M and  
Arizant Healthcare, Inc.:

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LORI G. COHEN, ESQ.  
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Atlanta, Georgia 30305

For Respondent  
Scott Augustine: Augustine Biomedical & Design LLC  
JAMES RANDALL BENHAM, ESQ.  
6581 City West Parkway  
Eden Prairie, Minnesota 55344

1 talking about and we will attempt to find the document that  
2 is referenced in it. I have not been able to find the  
3 letter they are talking about in our files. I don't doubt  
4 that it exists, I just would like to see it before I make  
5 some suppositions and go out searching for other documents.

6 The second relates to this social media and --

7 THE COURT: Come on, how many letters -- are we  
8 talking about item No. 10 on their subpoena list? The July  
9 9th letter to Kurt Hilzinger?

10 MR. BENHAM: Yes.

11 THE COURT: How many letters did he write to Kurt  
12 Hilzinger on that date?

13 MR. BENHAM: I don't have any idea. I do know --

14 THE COURT: Do you have reason to believe he wrote  
15 more than one?

16 MR. BENHAM: I don't have any reason to believe  
17 one way or the other. But, I don't believe I have an  
18 obligation to make suppositions and guesses as to what they  
19 are talking about.

20 THE COURT: Well, what's to suppose or guess about  
21 a letter dated July 9th, 2010 to Kurt Hilzinger? Couldn't  
22 you ask your client: Did you write a letter on that date to  
23 Kurt Hilzinger? Look at the letter and then ask him if he  
24 wrote 10 letters or 20 letters or 30 letters? And then I  
25 would say: Okay, I guess we don't know which of those

1 letters he is talking about. But, if they give you the date  
2 and the addressee, what more specificity do you need to know  
3 what letter they are talking about?

4 MR. BENHAM: I went far beyond that, Your Honor.  
5 I looked through his files and attempted to find a letter to  
6 that gentleman at any time, and I could not find it. Absent  
7 looking at the letter and reading the reference that they  
8 are talking about, I have to make a guess as to what they  
9 are talking about.

10 On the other hand, if they have the document and  
11 they will show it to me, I will see if I can find what they  
12 are looking for.

13 THE COURT: Okay.

14 MR. BENHAM: Beyond that, the Request No. 12 asked  
15 about every message relating to forced-air warming. My  
16 client is a company that produces a product that is intended  
17 to replace forced-air warming.

18 Over the last six or seven years of the companies'  
19 existence, there have been tens, if not hundreds of  
20 thousands of messages, internal and external, about forced  
21 air. It is essentially the only thing my company -- my  
22 client's company talks about.

23 I would urge that they need to narrow that a bit.  
24 Now, beyond that, Your Honor, even though I produced all of  
25 these documents, produced everything we had, in retrospect I

1 wonder if I should have in fact produced any of it, because  
2 we are not a party to this case. This is a product  
3 liability case. And what is there about a product liability  
4 case that let's the manufacturer of the accused product go  
5 rummaging through the files of their competition? This is  
6 largely irrelevant.

7 And what difference does it make what Dr.  
8 Augustine said to his co-workers, or what the director of  
9 engineering said to the director of quality control about  
10 forced air, or that was said to the public at large about  
11 forced air? This is not a business defamation case, but  
12 they want to take discovery of my client as if it were such  
13 a case. Of course, if they filed a business defamation  
14 case, my client would get the discovery back to establish  
15 the truth of what they are saying.

16 Now, they are trying to do discovery on us, a  
17 non-party -- but their only significant competitor -- as if  
18 there was litigation going on between 3M and Augustine, and  
19 there is none.

20 So, I would urge you to shut this down and make  
21 them stop taking depositions, and make them stop taking  
22 discovery of their competitor as if it had anything to do  
23 with this case at all.

24 If you choose not to do that, I would ask that you  
25 have them show me the document in response to No. 10, vastly